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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,
PETITIONER,

v.

MARK WHITE, ATTORNEY GENERAL
OF THE STATE OF TEXAS, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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Questions Presented for Review

1. Whether ecclesiastical rules of the Roman Catholic Church govern the effectiveness of a power of attorney which is purportedly valid under those ecclesiastical rules but which is invalid under Texas civil law in a civil proceeding which does not involve an intra-church dispute?

2. Whether the state of Texas, acting through its Attorney General and the south Texas courts, can deny the rights of the Petitioner, a Trappist monk, to a trial on the merits and to a trial by jury on the basis of that power of attorney, where control of a charitable foundation worth over three hundred million dollars ($300,000,000.00) hinges on that determination?

Parties to the Proceeding Below

CHRISTOPHER GREGORY, *Petitioner:* A Defendant in the Trial Court, an Appellant in the Court of Civil Appeals of Texas, and a Petitioner in the Supreme Court of Texas.

MARK WHITE, *Respondent:* The Attorney General of the State of Texas; was a Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

LEE H. LYTTON, JR., *Respondent:* The plaintiff in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, *Respondent:* A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

T. M. DOYLE, *Respondent:* A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

JOHN J. MEEHAN, *Respondent:* A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

J. PETER GRACE, *Respondent:* A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

BISHOP THOMAS J. DRURY, *Respondent:* An Intervenor in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

REVEREND PATRICK J. PEYTON, *Respondent:* A Defendant in the Trial Court, an Appellee in the Court of Civil Appeals of Texas, and a Respondent in the Supreme Court of Texas.

LAWRENCE E. WOOD: A Defendant in the Trial Court.

JACOB S. FLOYD: A Defendant and Cross-Plaintiff in the Trial Court, now deceased.

HENRIETTA K. ARMSTRONG: A Defendant in the Trial Court, now deceased.

ELENA S. KENEDY, B. R. GOLDAPP, KENNETH ODEN, AND THE ALICE NATIONAL BANK: Were never made parties to the proceedings below; however, appeared through their attorneys in connection with entry of the judgment herein claimed to be in error.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

The Petitioner Christopher Gregory respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas entered in this proceeding on November 26, 1980.

Opinions Below

The judgment of the Supreme Court of the State of Texas entered on November 26, 1980 refusing Petitioner's Application for Writ of Error was without opinion and is not reported. A copy of that judgment appears at page A-47 of the Appendix. The judgment of the Court of Civil Appeals of Texas, from which Petitioner applied to the Supreme Court of Texas for a Writ of Error, is reported at 604 S.W.2d 402 (Tex. Civ. App. 1980), a copy of which appears at page A-34 of the Appendix.

A related opinion of the Court of Appeals of Texas rendered in the action below on November 1, 1967 is reported at 422 S.W.2d 586 (Tex. Civ. App. 1967), a copy of which appears at page A-38 of the Appendix. That opinion was issued by the Court of Civil Appeals in affirming the dismissal of a Petition in the Nature of Bill of Review. The Supreme Court of Texas refused Petitioner's Application for a Writ of Error from the judgment of the Court of Civil Appeals on June 19, 1968, in an unreported decision without opinion.

An unrelated opinion of the Court of Civil Appeals of Texas rendered in the action below is reported at 371 Tex. Civ. App. 927 (1963). That opinion concerns dismissal of a petition for intervention, not herein relevant.

Jurisdiction

The judgment of the Supreme Court of the State of Texas sought to be reviewed was entered on November 26, 1980.[1] On December 11, 1980 Petitioner filed a Motion for Rehearing, which motion was denied on January 7, 1981. A copy of the judgment denying his Motion for Rehearing appears at page A-48 of the Appendix. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions Involved

1. United States Constitution, Amendment I, as incorporated to the states through Amendment XIV:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

2. United States Constitution, Amendment V, as incorporated to the states through Amendment XIV:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

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[1] The time of entry of judgment is not indicated in court records.

3. United States Constitution, Amendment VII, as incorporated to the states through Amendment XIV:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,. . .

Statement of the Case

I. *Factual Background.*

The Petitioner Christopher Gregory ["Gregory"] is a member of the Order of Cistercians of the Strict Observance, also known as the Trappists[2] ["the Trappists"]. Sometime in 1947, Gregory became acquainted with Sarita Kenedy East ["East"]. During this time, Gregory was assisting in establishing Trappist monasteries in North and South America. Between 1946 and 1961, he helped establish seven such monasteries. East made a number of substantial contributions to this expansion program, and made several trips to the sites of the new monasteries in the United States, Argentina and Chile.

In 1960, East established The John G. and Marie Stella Kenedy Memorial Foundation ["the Foundation"] under the Texas Non-Profit Corporation Act. East signed the documents establishing the Foundation on or about January 22, 1960 at the office of her attorneys in Houston, Texas, who had drawn up the documents. At the same time, she executed a will, also prepared by her attorneys, in which she left the bulk of her estate to the Foundation. The purpose of the Foundation was to advance religious, charitable and educational goals.

At the time the Foundation was established, East named herself the sole member. On or about February 11, 1960 East appointed two additional members to the Foundation, Jacob

[2] Gregory is known as "Brother Leo" among the Trappists, and is occasionally referred to in that manner in pleadings filed in the action below.

Floyd ["Floyd"] and Lee H. Lytton ["Lytton"]. Sometime thereafter, Floyd and Lytton voluntarily resigned from the Foundation, at East's request, leaving East the sole member once again. On December 30, 1960 East appointed Gregory the second member of the Foundation.[3]

East died on February 11, 1961, leaving Gregory in control of the Foundation as its only member, with the power to appoint the Foundation's Board of Directors.

II. *Prior Proceedings.*

On April 19, 1961, Lytton filed a document entitled Plaintiff's Original Petition and Application for Injunction in the 79th District Court of Jim Wells County, Texas. *Lytton* v. *The John G. and Marie Stella Kenedy Memorial Foundation, et al.*, Cause No. 12,074 ["the Foundation Suit"]. Lytton named among the defendants the Foundation and Gregory. Lytton alleged that, because of undue influence exerted over East by Gregory and another defendant, East requested the resignations of Lytton and Floyd from membership in the Foundation in 1960, which resignations they voluntarily tendered. Lytton claimed that his and Floyd's resignations should be held null and void because of alleged undue influence exerted over East. He also claimed that, because of the same alleged undue influence, East's subsequent appointment of Gregory to membership in the Foundation should be held null and void, and that all subsequent actions by Gregory in his capacity as member of the Foundation should be held null and void. Lytton sought, in addition, injunctive relief.

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[3] In addition to the appointments described above, East from time to time attempted to make appointments to the membership and directorship of the Foundation through the execution of the First through the Sixth Codicils to her will. The validity of these appointments is doubtful. In any event, their validity is not at issue here.

A temporary restraining order was entered on August 23, 1961 without notice.[4] The Foundation and Gregory, along with certain other defendants, thereafter filed a joint answer in which they denied the allegations of the Petition.[5] The issues alleged by Lytton and denied by the defendants have never been tried.

On September 1, 1964, the trial court, after hearing, entered judgment in the action below ["the initial judgment"]. A-1. That initial judgment was based on an alleged compromise and settlement purportedly entered into by the parties to the action. Gregory had signed the alleged settlement agreement some months prior to the hearing, but consistently claimed throughout the proceedings below that his consent was expressly conditional upon the occurrence of events which had not occurred, and was obtained as the result of duress and undue influence. Gregory contended in addition that the alleged agreement had been altered after he signed his conditional consent. In any event, Gregory had expressly revoked his conditional consent both prior to the hearing and again afterward.[6]

Prior to the hearing, Gregory had been sent to a monastery outside the country. Gregory was not notified of nor was he present at the hearing at which the alleged settlement was purportedly confirmed. Gregory's resignation from the Foundation and several additional corporate actions were necessary at

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[4] The Restraining Order remained in effect through the time of entry of judgment on September 1, 1964 by agreement of the parties. The September 1 judgment then extended injunctive relief as a term of the judgment.

[5] The pleadings filed with the trial court are voluminous, including several amendments to Lytton's petition. Those pleadings, however, are not relevant to the questions presented here.

[6] These revocations by Gregory and by his then-attorney appear at pages A-50 through A-52 of the Appendix. Revocation of consent to a settlement is effective under Texas law. *Burnaman* v. *Heaton*, 240 S.W. 2d 288 (Tex. 1951).

the hearing to effectuate the alleged settlement. A purported resignation[7] was tendered at the hearing by Robert Jewett ["Jewett"], an attorney who claimed to hold a power of attorney from Gregory. The power of attorney was not, in fact, from Gregory. It consisted of two telegrams sent to Jewett by Thomas Keating ["Keating"], Abbot of St. Joseph's Abbey in Spencer, Massachusetts. A-48. The telegrams recited that they were given by Keating "as the Superior of Christopher Gregory (Brother Leo)." On the basis of those telegrams alone, the trial judge accepted the purported power of attorney and Gregory's resignation, and entered judgment.

Gregory was not notified of entry of the initial judgment. On March 8, 1966, soon after Gregory learned of the entry of that initial judgment, he brought a Petition in the Nature of Bill of Review seeking review of the initial judgment. *Gregory* v. *Lytton, et al.*, Cause No. 13,850, 79th District Court of Jim Wells County ["the Bill of Review"]. Gregory alleged that his purported resignation from the Foundation, tendered by Jewett, was invalid; that his signature on the alleged settlement agreement was obtained as a result of duress and undue influence; and that his consent to the settlement agreement was, in any event, explicitly conditioned upon the occurrence of events which had not occurred. Gregory also claimed that the purported settlement agreement had been altered after his signature was affixed thereto.

The defendants in the Bill of Review (Cause No. 13,850) filed motions to dismiss Gregory's petition, on the grounds that the initial judgment entered in the Foundation Suit (Cause No. 12,074) on September 1, 1964 was interlocutory and therefore not subject to review. On May 8, 1967 the Court granted the motions to dismiss. The Court held that the judgment was interlocutory in its entirety and would not be final until the

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[7] A previous resignation had been expressly revoked prior to the September 1, 1964 hearing. Notice of that revocation was filed with the trial court by Gregory's then-attorney in September, 1963.

resolution of the contest of the probate of East's will.[8] Resolution of that lawsuit would determine whether East's estate (of over $300,000,000.00) would, in fact, flow into the Foundation.

Gregory appealed from the dismissal of his petition. The Court of Civil Appeals for the Fourth Judicial District of Texas at San Antonio affirmed the decision of the Trial Court on November 1, 1967. *Gregory* v. *Lytton, et al.*, 422 S.W.2d 586 (Tex. Civ. App. 1967). A-38. Gregory thereafter filed an Application for a Writ of Error in the Supreme Court of Texas, which application was denied without opinion on June 19, 1968. Gregory's Motion for Rehearing was also denied on July 24, 1968.

Gregory subsequently filed, on August 1, 1968 in the Foundation Suit (Cause No. 12,074), a document entitled Motion to Set Aside Interlocutory Judgment, Motion to Dismiss a Party and Answer. The lawsuit was then inactive for a period of years, pending outcome of the will contest upon which the initial judgment had been found to be interlocutory.

After conclusion of the will contest, Mark White ["White"], the Attorney General of the State of Texas, who was made a party below by statute, filed a Motion for the Entry of Final Judgment. In his motion, White stated that the initial interlocutory judgment entered on September 1, 1964 had dismissed the action with prejudice as against Gregory, and that the initial judgment should be made final without trial. Gregory thereafter filed an amended motion to set aside the initial judgment, in which he again indicated his lack of consent with the purported settlement agreement. He formally demanded a trial by jury.

On September 21, 1979, the trial court heard argument on White's motion for entry of final judgment. Counsel for

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[8] *Trevino, et al.* v. *Turcotte, et al.*, Cause No. 101,209-D, in the District Court of Neuces County, Texas, 105th Judicial District. The subsequent dismissal of that lawsuit is reported at 564 S.W.2d 682 (Tex. Civ. App. 1978).

Gregory appeared at that hearing, and raised the issue of Keating's lack of authority under civil law to grant a power of attorney on behalf of Gregory. He also raised the issues of right to trial and right to trial by jury.

On November 28, 1979, the Court granted White's motion and entered final judgment. A-24. The final judgment incorporated all the substantive provisions of the initial interlocutory judgment.

Gregory appealed from the final judgment to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio, raising Constitutional grounds of right to trial by jury and due process. On July 25, 1980 the Court of Civil Appeals affirmed the final judgment of the trial court. *Gregory* v. *White, et al.*, 604 S.W.2d 402 (Tex. Civ. App. 1980). A-34. Gregory moved for a rehearing, which motion was denied on September 10, 1980.

On October 15, 1980, Gregory filed an Application for Writ of Error in the Supreme Court of the State of Texas. He again raised Constitutional grounds of right to trial by jury and due process. On November 26, 1980 the Supreme Court of Texas refused his application. A-47. Gregory moved for a rehearing, which motion was denied on January 7, 1981. A-48.

Reasons for Granting the Writ

I. The Action of the Courts Below Violated the Establishment Clause of the First Amendment to the United States Constitution.

On September 1, 1964, the judge in the trial court below accepted a written power of attorney as binding on Gregory, and entered judgment pursuant to that power of attorney. The power of attorney was not, however, executed by Gregory. It was given by Keating explicitly in his capacity as Gregory's religious "superior". A-48. There was no evidence before the

judge of any grant of authority from Gregory to Keating or from Gregory to Jewett.[9] The Court's acceptance of that power of attorney, which was necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory, violated the Establishment Clause of the First Amendment.

Two provisions of the First Amendment relate to the guarantees of religious freedom: The Establishment Clause and the Free Exercise Clause. There is, of course, overlap between the provisions, but their main thrusts are somewhat different. The Establishment Clause, on one hand, forbids the government from taking any step toward the establishment of religion. Proscribed actions include compelling, sanctioning or aiding religion over non-religion, or one religion over any other religion, *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947), *reh. den.* 330 U.S. 855, thereby according civil effect to a religious or ecclesiastical principle. The Free Exercise Clause, on the other hand, forbids the government from interfering with or involving itself in the right of the individual to exercise religious freedom. That freedom includes one's right to his religious beliefs, *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977), and the right of a religious body to function without governmental involvement. *Watson* v. *Jones*, 80 U.S. 666, 679 (13 Wallace 679) (1872). The relationship between the two clauses can best be described as requiring complete and absolute neutrality by government in all matters pertaining to religion. *Gillette* v. *U.S.*, 401 U.S. 437, 449 (1971), *reh. den.* 402 U.S. 934; *Abington School District* v. *Schempp*, 374 U.S. 203, 226 (1963); *Everson* v. *Board of Education*, 330 U.S. 1, 31-32 (1947), *reh. den.* 330 U.S. 855.

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[9] Jewett claimed, at the hearing on White's Motion for Entry of Final Judgment on September 21, 1979, that he had received "corroboration" of Keating's authority to act on Gregory's behalf after the 1964 hearing at which the initial judgment was entered. Even if that were true (which Gregory denies), it would be irrelevant to the propriety of the Court's acceptance of the purported power of attorney at the 1964 hearing.

Lawsuits like this one which involve the interplay between ecclesiastical law and civil law can cast the two provisions in a contradictory light. Present in such cases are the possibility of governmental compulsion to adhere to a religious belief, in violation of the Establishment Clause; the possibility of governmental sanctioning of a certain religious belief, also in violation of the Establishment Clause; as well as the possibility of governmental interference with ecclesiastical rules and hierarchy, in violation of the Free Exercise Clause. One could view this case either as an example of the court sanctioning a religious superior's asserted ecclesiastical right to control the conscience of his religious subjects, or, instead, as an example of the court properly deferring to the ecclesiastical rules and practice controlling the relationship between a Trappist monk and his religious superior.

Gregory submits that the former perspective is the proper one. As set forth below, this is not a case where the government is required by the Free Exercise Clause to accept Keating's bald assertion that he has the right to sign away Gregory's constitutional rights to trial and trial by jury solely because Gregory is a Trappist monk. "Nothing [this Court has] said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940).

A. *The Free Exercise Clause Does Not Require Adherence to Ecclesiastical Rules or Practice in the Context of a Non-Intra-Church Dispute.*

In a long line of cases beginning with *Watson* v. *Jones*, 80 U.S. 666 (13 Wallace 679) (1872), this Court has considered the relationship between ecclesiastical law and civil law in civil courts. In *Watson* v. *Jones*, the Court considered the deference which must be given the decision of an ecclesiastical tribunal by a court hearing what is essentially an ecclesiastical dispute. The Court held:

> [W]henever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. *Jones*, 80 U.S. 666, 676 (13 Wallace 679) (1872).

This Court has recently reaffirmed the principles enunciated in *Watson* v. *Jones*, and has expanded upon those principles. In *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the Court held that a civil court is powerless to determine whether there has been a departure from doctrine by an ecclesiastical tribunal. The case of *Serbian Eastern Orthodox Diocese* v. *Milivojevoch*, 426 U.S. 696 (1976), *reh. den.* 429 U.S. 873, presented a similar question in the context of a dispute over defrockment of a priest which would determine control of church property. The Court held:

> When this choice [of an ecclesiastical tribunal] is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian Eastern Orthodox Diocese v. *Milivojevoch*, 426 U.S. 696, 724-25 (1976), *reh. den.* 429 U.S. 873.

This Court considered another aspect of the issue in *United Methodist Council* v. *Superior Court*, 439 U.S. 1369 (1978), a case which, unlike those discussed above, did not involve an intra-church dispute. It involved instead class action claims against the United Methodist Council and five other defendants for breach of contract, fraud and violations of state securities laws arising out of the financial collapse of a group of retirement homes. The United Methodist Council moved to quash service of process on the grounds that the Superior Court

violated the First and Fourteenth Amendments in refusing to accept its characterization of its position in the hierarchy of the United Methodist Church, which characterization would have excused the Council from the lawsuit. This Court rejected the argument that the lower court was bound by the church's interpretation of its structure and hierarchy.

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes... But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. [citations omitted].

United Methodist Council v. *Superior Court*, 439 U.S. 1369, 1372-73 (1978).

Thus the principle of *Watson* v. *Jones* and its progeny—that a civil court is bound by the decision of an ecclesiastical tribunal on an ecclesiastical matter—is not applicable in an action which is not an intra-church dispute.

The conclusion that the First Amendment does not *require* adherence to ecclesiastical principles in this context does not, however, address the question whether, conversely, the First Amendment *permits* such adherence. This Court has paved the way for consideration of this issue, but has stopped short of deciding it. Gregory submits that it is now appropriate to decide the question.

B. *The Establishment Clause Does Not Permit Reliance Upon Ecclesiastical Authority in the Context of a Non-Intra-Church Dispute.*

The central purpose of the Establishment Clause is to ensure complete and absolute government neutrality in matters of religion. *Gillette* v. *United States*, 401 U.S. 437, 449 (1971),

reh. den. 402 U.S. 934. It forbids subtle departures from neutrality as well as obvious abuses. *Id.*

The way in which this Court has mandated that neutrality be ensured is by the complete separation of church and state.

> [T]he object [of the First Amendment] was broader than separation of church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Abington School District v. *Schempp*, 374 U.S. 203, 217 (1963); *Everson* v. *Board of Education*, 330 U.S. 1, 31-32 (1947), *reh. den.* 330 U.S. 855.

The Establishment Clause and the companion doctrine of separation of church and state were aimed at eliminating governmental persecution and inequality under the law based on religious belief. The historical justification for these doctrines was recounted by this Court in *Everson* v. *Board of Education*, 330 U.S. 1, 8-11 (1947), *reh. den.* 330 U.S. 855. The protection of citizens from governmental persecution because of religious belief is a cornerstone of the principles of individual liberty.

> [T]he first and immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Engel v. *Vitale*, 370 U.S. 421, 431 (1962). When government allies itself with one form of religion, the inevitable result is that it incurs "the hatred, disrespect and even contempt of those who hold contrary beliefs." *Id.*

The separation of church and state has the dual effects of protecting government from the dangers of religious involvement and, conversely, the effect of protecting religion from the dangers of government involvement.

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority.

Watson v. *Jones*, 80 U.S. 666, 676 (13 Wallace 679) (1872).

The trial judge below departed from "complete government neutrality" in accepting the power of attorney given by Keating. The power of attorney was necessarily premised on ecclesiastical authority, for there was no evidence before the court of civil authority or of agency. It is clear that a court could not accept a power of attorney gratuitously offered by a third party purportedly on behalf of a litigant, absent the asserted ecclesiastical authority. *See, e.g., Gulf States Paint Co.* v. *Kornblee Co.*, 390 S.W.2d 356 (Tex. Civ. App. 1965); *Fidelity Trust Co.* v. *Fowler*, 217 S.W. 953 (Tex. Civ. App. 1920). By placing official reliance on that power of attorney, the court sanctioned the ecclesiastical right of Keating to give it.

It is no justification to argue that the court did not favor one religion over another, and therefore did not exceed the bounds of propriety set by the Establishment Clause. "[S]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *McCollum* v. *Board of Education*, 333 U.S. 203, 227 (1948). The Establishment Clause forbids placing official support of government "behind the tenets of one or of all orthodoxies." *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963).

By accepting Keating's claim of ecclesiastical authority, the court placed its imprimatur on the tenets of the Roman Catholic Church. This sanctioning of ecclesiastical practice is an egregious violation of the First Amendment.

II. The Issue Involved Is of Major Importance and Has Broad Implications Nationwide.

The issue presented in this Petition—whether a court may rely on ecclesiastical rules and practice to bind a litigant in a non-intra-church dispute—is not limited to the facts of this case. It is not simply a question whether Gregory could be bound by the actions of his Abbot, but whether any litigant who happens to be a member or follower of a given religion can be bound by the tenets of that religion in a court of law. Determination of this question would be of importance to all litigants of all religions, particularly those whose personal interests come into conflict with the interests of their church hierarchies.

This issue is of great importance for the additional reason of its impact upon other constitutional guarantees of the litigants involved. In this case, for instance, the upshot of Gregory's being bound by Keating's power of attorney was denial of his rights to trial and to trial by jury, guaranteed by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution. *See* section III, *infra*. Despite Gregory's repeated protestations that he did not consent to the purported settlement agreement, he was denied a trial on the issue of the agreement's validity because of the court's reliance on Keating's power of attorney. One can readily see how such reliance on ecclesiastical authority could, in other fact situations, have an impact upon a litigant's rights under other constitutional provisions, statutes or regulations.

The right to be free from governmental complusion to adhere to a given religious belief or rule is fundamental to individual liberty. This is true even where the individual, in the ordinary course of events, is a believer or follower of that religion. The fact that an individual has agreed to abide by the rules of his religion for purposes of protecting the autonomy of that religion and furthering its goals cannot imply that he has

also given up his right to act independently of his religion in courts of law. Resolution of this issue is especially important at a time when church-state relations are becoming increasingly complex. The determination now of the issue this case presents would likely have broad application and impact in the future.

III. The Actions of the Courts Below Violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

One simple fact is especially noticeable in the action below: Gregory was never given a trial on the merits by the south Texas courts on any of the issues he attempted to raise below. The glaring omission of any trial on the merits cannot be reconciled with the mandates of the Due Process Clause of the Fourteenth Amendment.

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

Boddie v. *Connecticut*, 401 U.S. 371, 374 (1971). Central to the operation of the system through which citizens may settle their disputes is the concept of due process. *Id.*, at 375. The fundamental element of due process is the opportunity to be heard. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971); *Armstrong* v. *Manzo*, 380 U.S. 545, 554 (1965).

> The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Mathews v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951). In order for the opportunity to be heard to satisfy the requirements of due process, that opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 554 (1965).

At no time was Gregory given a meaningful opportunity to be heard in the Texas courts on even his claim that Keating lacked the authority to give a power of attorney on his behalf, *see* section I, *supra*, not to mention his defenses to the allegations of undue influence. The result of the denial of the opportunity to be heard was that Gregory was bound by actions carried out pursuant to Keating's alleged power of attorney and was thereby excluded from membership in the Foundation and denied the right to direct the use of the funds of the Foundation.

Gregory was not given the opportunity to be heard at any meaningful time with respect to his consent or lack thereof with the alleged settlement agreement prior to the entry of the initial judgment on September 1, 1964.[10] Gregory has had no hearing whatsoever on his claims that his purported consent to the settlement was conditional, that it was the result of duress and undue influence, or that the settlement agreement was altered after he last saw it. And, in 1979, Gregory was again denied the right to a trial on the issue of his consent at that time to the settlement, prior to the final judgment.

---

[10] There was limited testimony at the September 21, 1979 hearing on the motion for final judgment regarding Gregory's alleged consent to the settlement prior to the entry of the initial interlocutory judgment, a full fifteen years earlier. The issue, however, was whether Gregory's alleged consent was effective at the time of entry of final judgment. Gregory was not afforded a trial on that issue, to which he was entitled. See *Burnaman* v. *Heaton*, 240 S.W. 2d 288 (Tex. 1951).

Looking one layer deeper into the issues which have never been heard, Gregory has never been afforded an opportunity to be heard on the underlying claim that he exercised undue influence over East. Moreover, Gregory has not simply been denied the right to hearing; he has also been denied the right to a trial by jury, to which he was entitled.

Gregory, a Trappist monk, as a matter of conscience seeks among other things to be afforded the opportunity to fulfill the responsibilities imposed upon him by the founder when she appointed him to be the sole surviving member of her Foundation. He has been frustrated in his efforts to carry out her charitable goals by the imposition by the civil courts of south Texas of purported ecclesiastical rules and conventions rather than principles of governing civil law. In effect, the south Texas courts enforced an alleged settlement agreement to which Gregory never unconditionally consented, not once but twice, without trial on the underlying questions of fact. Indeed, the parties and the trial court were well aware that Gregory explicitly did *not* consent to the agreement before the entry of final judgment. "It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable." *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974). This court should not permit this blatant affront to the Constitution to stand.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Texas.

Respectfully submitted,

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(617) 742-9100
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Of Counsel:
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Corpus Christi, Texas 78477
(512) 888-9201

Dated:

APPENDIX

Entered September 1, 1964

IN THE DISTRICT COURT OF JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H. LYTTON, JR.

v.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, ET AL

JUDGMENT

BE IT REMEMBERED that on this 1st day of September, 1964, there came on to be heard the above entitled and numbered cause, wherein Lee H. Lytton, Jr. is plaintiff and cross-defendant, Jacob S. Floyd is defendant and cross-plaintiff, Most Reverend M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, is intervenor, and The John G. and Marie Stella Kenedy Memorial Foundation, T. M. Doyle, John J. Meehan, J. Peter Grace, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, Lawrence E. Wood and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., are defendants and cross-defendants, and wherein the Attorney General of the State of Texas is joined as a party, having been served with process and citation in accordance with the terms of Article 4412a, Section 3, Vernon's Civil Statutes of Texas, these being all of the parties of record in this suit, and it appearing to the court that T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong and Lawrence E. Wood have this day, in open court, resigned from, and renounced their rights to, their respective offices as members, directors and officers of The John G. and Marie Stella Kenedy memorial Foundation, and that the

plaintiff and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverand M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, by and through their attorneys or record, announced in open court that they, the said plaintiffs and cross-defendant, Lee H. Lytton, Jr., and the defendant and cross-plaintiff, Jacob S. Floyd, and the intervenor, Most Reverand M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, no longer wished to prosecute this suit as against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood and requested that the court dismiss this suit, with prejudice, as against said parties;

It is accordingly ORDERED, ADJUDGED and DECREED by the court that this suit be and the same is hereby dismissed, with prejudice, against the said T. M. Doyle, John J. Meehan, Rev. Patrick J. Peyton, C. S. C., Henrietta K. Armstrong, joined pro forma by her husband, Thomas M. Armstrong, and Lawrence E. Wood.

And then came the remaining parties to this action, to-wit, plaintiff and cross-defendant Lee H. Lytton, Jr., defendant and cross-plaintiff Jacob S. Floyd, intervenor Most Reverand M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, defendants and cross-defendants The John G. and Marie Stella Kenedy Memorial Foundation, Christopher Gregory, sometimes known as Brother Leo O.C.S.O., J. Peter Grace and the Attorney General of the State of Texas, all by and through their respective attorneys of record, and announced ready for trial; whereupon, a jury being waived by all parties, it was announced to the court that the parties hereto had agreed to compromise and settle all issues raised herein, as well as all issues made the basis of this suit, it being distinctly understood that in making this settlement no party makes any admission with regard to any of the allegations

made in the pleadings on file in this suit; and it further appearing that Lee H. Lytton, Jr. and Jacob S. Floyd have this day, in open court, ratified their resignations, dated June 13, 1960, as members of The John G. and Marie Stella Kenedy Memorial Foundation, and that the sole and only members of said The John G. and Marie Stella Kenedy Memorial Foundation now remaining are J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O.; and it further appearing to the court that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereupon, in open court, appointed, in compliance with the By-Laws of said The John G. and Marie Stella Kenedy Memorial Foundation, the following persons as members of such Foundation, to-wit:

Most Reverand M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing that the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O., thereafter, in open court, resigned from their respective offices as members and/or directors of said The John G. and Marie Stella Kenedy Memorial Foundation in compliance with the By-Laws of such Foundation; and it further appearing to the court that the aforesaid members, to-wit, Most Reverand M. S. Garriga, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden and B.R. Goldapp, have, in open court, duly elected the following named persons as directors of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-Laws thereof, to-wit:

Most Reverand M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi
Elena S. Kenedy
Lee H. Lytton, Jr.
Kenneth Oden
B.R. Goldapp

and it further appearing to the court that the aforesaid directors, have in open court, duly elected the following officers of said The John G. and Marie Stella Kenedy Memorial Foundation, pursuant to the By-laws thereof, to-wit:

Elena S. Kenedy - *President*
Bishop M. S. Garriga - *Vice President*
Kenneth Oden - *Secretary-Treasurer*
Lee H. Lytton, Jr. - *Assistant Secretary-Treasurer*

and it appearing to the court that the members have, in open court, adopted amendments to the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation, in the form of Exhibit A attached hereto and made a part hereof, and have, in open court, adopted amendments to the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation, which said amendments to the By-Laws are set forth in Exhibit B attached hereto and made a part hereof, and the court having examined said amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation are found the same to be in proper order and to reflect correctly the agreement of the parties and that such amendments to the Articles of Incorporation and By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation should be approved and ratified by the court; and it appearing to the court, and the court having been fully advised in the premises, that the aforesaid compromise and settlement should be approved and that Judgment should be entered herein in accordance with such settlement agreed upon; and it further appearing to the court that the proper

officers of the said Foundation, also in open court, in accordance with this compromise agreement and Judgment have executed the instrument, a copy of which is attached to this Judgment and made a part hereof and marked Exhibit C, and which instrument has been examined by the court and found to be in proper order and to reflect correctly the agreement of the parties and such instrument should be approved and ratified by the court; and it further appearing to the court that all parties to this action acting by and through their duly authorized attorneys of record, in open court, have approved this Judgment by affixing their signatures hereto; and it further appearing to the court that the Attorney General of Texas, in open court, by and thrugh his designated Assistant Attorney General, has stated that the Attorney General's Office has reviewed the terms, conditions and provisions of this settlement and all exhibits attached hereto, and that the said terms, conditions and provisions have been found to be in the best interests of the public beneficiaries of Texas, and therefore the Attorney General of Texas does hereby ratify and grant to this settlement according to the provisions of Article 4412a, Vernon's Civil Statutes of Texas, and the court being of the opinion that upon the recommendation of the Attorney General of Texas this settlement be in all things approved;
It is accordingly ORDERED, ADJUDGED and DECREED by the court—

(1) That on the date of this Judgment, and pursuant to the appointment of members and election of directors and officers as aforesaid, the present and only duly and legally authorized and elected members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation are as follows:

Members: MOST REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi, and/or his successors in office
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP

Directors: MOST REVEREND M. S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi
ELENA S. KENEDY
LEE H. LYTTON, JR.
KENNETH ODEN
B.R. GOLDAPP

Officers: ELENA S. KENEDY - *President*
BISHOP M.S. GARRIGA - *Vice President*
KENNETH ODEN - *Secretary-Treasurer*
LEE H. LYTTON, JR. - *Assistant Secretary-Treasurer*

(2) That the meetings and acts of the members, directors and officers of The John G. and Marie Stella Kenedy Memorial Foundation, as reflected by the minutes thereof, held or done in open court this day, be and they are in all things confirmed, ratified and approved as the legal and binding acts of The John G. and Marie Stella Kenedy Memorial Foundation.

(3) That the instrument executed by the President of The John G. and Marie Stella Kenedy Memorial Foundation and attested by its Secretary be and it is hereby declared to be the legal act of The John G. and Marie Stella Kenedy Memorial Foundation, a copy of such instrument, marked Exhibit C, being attached to and all of its terms being made a part of this Judgment, as if fully incorporated herein.

(4) That this suit, as to all issues raised herein by any party herein, be and the same is hereby dismissed, with prejudice, as against the said J. Peter Grace and Christopher Gregory, sometimes known as Brother Leo O.C.S.O. The John G. and Marie Stella Kenedy Memorial Foundation is hereby dismissed as a party defendant.

APPROVED AS TO FORM AND SUBSTANCE:

s/ LEE H. LYTTON, JR.
LEE H. LYTTON, JR.
Plaintiff

s/ JACOB S. FLOYD
JACOB S. FLOYD
Defendant and Cross-Plaintiff
PERKINS, FLOYD, DAVIS & ODEN
P.O. Drawer 331
Alice, Texas
By s/ KENNETH ODEN
KENNETH ODEN
Attorneys for Plaintiff Lee H. Lytton, Jr., Defendant and Cross-Plaintiff Jacob S. Floyd and Executors of the Estate of Sarita Kenedy East, Deceased
s/ M. S. GARRIGA
M.S. GARRIGA, Roman Catholic Bishop of the Diocese of Corpus Christi
Intervenor
s/ ELMORE BORCHERS
ELMORE BORCHERS
Laredo, Texas
and
s/ PATRICK J. HORKIN, JR.
PATRICK J. HORKIN, JR.
717 Commerce Building
Corpus Christi, Texas
Attorneys for Intervenor M. S. Garriga, Roman Catholic Bishop of the Diocese of Corpus Christi
s/ T. M. DOYLE
T. M. DOYLE
Defendant and Cross-Defendant
s/ JOHN J. MEEHAN
JOHN J. MEEHAN
Defendant and Cross-Defendant
s/ J. PETER GRACE
J. PETER GRACE
Defendant and Cross-Defendant

s/ REV. PATRICK J. PEYTON, C.S.C.
REV. PATRICK J. PEYTON, C.S.C.,
Defendant and Cross-Defendant,
Acting Individually and as a Member of the
Congregation of Holy Cross Under Valid Authority
of His Lawful Religious Superior

s/ CHRISTOPHER GREGORY
CHRISTOPHER GREGORY,
Sometimes Known as Brother Leo, O.C.S.O.,
Defendant and Cross-Defendant, Acting Individually
and as a Religious of the Cistercian Order of the
Strict Observance Under Valid Authority of His
Lawful Religious Superior

BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas

s/ DENMAN MOODY
DENMAN MOODY
Attorneys for Defendants and Cross-Defendants
Doyle, Meehan, Grace, Peyton and Gregory
HENRIETTA K. ARMSTRONG
Defendant and Cross-Defendant
THOMAS M. ARMSTRONG
Defendant and Cross-Defendant (pro forma)
LAWRENCE E. WOOD
Defendant and Cross-Defendant

KLEBERG, MOBLEY, LOCKETT & WEIL
Jones Building
Corpus Christi, Texas
By:

M. HARVEY WEIL
Attorneys for Defendants and Cross-Defendants
Henrietta K. Armstrong, Joined Pro Forma By Her
Husband, Thomas M. Armstrong, and Lawrence E.
Wood

THE JOHN G. AND MARIE STELLA KENEDY
MEMORIAL FOUNDATION
Defendant and Cross-Defendant

By: BAKER, BOTTS, SHEPARD & COATES
1600 Esperson Building
Houston 2, Texas
By s/ DENMAN MOODY
DENMAN MOODY
WAGGONER CARR
Attorney General of the State of Texas
By: s/ J. GORDON ZUBER
J. GORDON ZUBER
Assistant Attorney General
s/ JACOB S. FLOYD
JACOB S. FLOYD
Independent Executor of the Estate of Sarita Kenedy East, Deceased
ALICE NATIONAL BANK OF ALICE, TEXAS
Independent Executor of the Estate of Sarita Kenedy East, Deceased
By: s/ B.R. GOLDAPP
B.R. GOLDAPP

V

All temporary restraining orders heretofore issued by this Court are hereby vacated and dissolved, and by agreement of the parties hereto, they are hereby enjoined and restrained from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees, and representatives, insofar

as any such monies and/or royalties have heretofore been or may hereafter be received under the terms of any and all of the three following described instruments, to-wit:

(1) That certain instrument dated April 21, 1960, recorded in the Oil & Gas Records of Kenedy County, Texas, in Volume 9, Pages 544 et seq.,

(2) That certain instrument dated February 13, 1960, recorded in the Deed Records of Jim Hogg County, Texas, in Volume 42, Pages 52, et seq. and

(3) That certain instrument dated January 2, 1961, recorded in the Oil & Gas Lease Records of Jim Hogg County, Texas, in Volume 50, Page 305, et seq.,

EXCEPTED, HOWEVER, from this temporary injunction and the terms and provisions thereof are any and all monies expended heretofore, or which may be expended hereafter, for the payment of taxes, or for payment of compensation to bookkeepers or auditors, and for investment in term United States Government securities; and they are further restrained and enjoined from assigning, transferring, conveying, pledging, mortgaging, or hypothecating any part or portion of the rights and/or properties purporting to pass from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation under the terms of any and all of said three instruments above described; PROVIDED, HOWEVER, that nothing contained in this temporary injunction shall in any wise be construed to affect, interfere with, or terminate in any manner, the existing rights of the said John G. and Marie Stella Kenedy Memorial Foundation, its officers, members, directors, agents, and representatives, to demand, collect, and receive all monies and/or royalties due, or to become due, from any person, firm, or corporation, under the terms of said three written instruments above described.

This is an interlocutory order and shall remain in full force and effect until further ordered by this Court.

VI

All costs of suit shall abide the issue.

VII

And it further appearing to the court that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled, Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased, vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, as a result of which, the parties hereto have refrained from executing and delivering the assignment, a copy of which is attached to this Judgment as Exhibit C;

IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that all language hereinabove contained inconsistent with this finding is hereby amended and modified to conform hereto, and the proper parties and persons are hereby authorized and directed to execute, acknowledge and deliver such assignment upon the vacation or avoidance of such temporary injunction and the temporary injunction hereinabove provided for.

RENDERED AND SIGNED this 1st day of September, 1964.

s/C. W. LAUGHLIN

C. W. LAUGHLIN, *District Judge.*

ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

Pursuant to the provisions of Article 4.03 of the Texas Non-Profit Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation which add thereto a new Article IX dealing with the membership of the Foundation and a new Article X dealing with the contributions to be made by the Foundation:

1. The name of the Corporation is The John G. and Marie Stella Kenedy Memorial Foundation.

2. The following amendment to the Articles of Incorporation was adopted by the Corporation on Sept. 1, 1964.

The Articles of Incorporation are hereby amended by adding thereto a new Article IX and a new Article X reading as follows:

ARTICLE IX

(a) The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;

(iii) at least two members who shall be non-Catholic.

(b) At no time shall the membership be less than sixty percent (60%) Catholic, the said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

(c) This Article IX of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE X

(a) The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the

total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

(b) All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

(c) This Article of the Articles of Incorporation of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

3. The amendment was adopted in the following manner:

The amendment was adopted at a meeting of the members of the Foundation held on September 1, 1964, at which a quorum was present, and the amendment received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

DATED_____; 19____

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

By_____
Its President

_____
Its Secretary

THE STATE OF TEXAS }
COUNTY OF JIM WELLS }

I, _____, a Notary Public, do hereby certify that on this _____ day of _____, 196__, personally appeared before me _____, and being duly sworn, declared that he is President of the

Corporation executing the foregoing document, that he signed the foregoing document in the capacity therein set forth, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public in and for
Jim Wells County, Texas

My Commission Expires:_____

(Notarial Seal)

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

Certified Copy of Amendments to By-Laws

I, _____, Secretary of The John G. and Marie Stella Kenedy Memorial Foundation, a non-profit charitable corporation organized and existing under the laws of the State of Texas, do hereby certify that at a meeting of the members and directors of such Foundation which was duly held in accordance with its By-Laws, the By-Laws of such Foundation were duly amended to cause Article III thereof to be amended to add as a part thereof new paragraphs 1a, 1b, and 1c reading as hereinbelow set forth, to add a new Article XI thereto reading as hereinbelow set forth, and to renumber the present Article XI of such By-Laws as Article XII, and that such amendments to its By-Laws of such Foundation are duly effective and have not been rescinded or modified in any manner.

1a. The membership of The John G. and Marie Stella Kenedy Memorial Foundation shall be composed of the following:

(i) the Roman Catholic Bishop of the Diocese of Corpus Christi or his successors in office;

(ii) at least two other practical Catholics;
(iii) at least two members who shall be non-Catholic.

1b. At no time shall the membership be less than sixty percent (60%) Catholic, and said sixty percent (60%) to include the Roman Catholic Bishop of the Diocese of Corpus Christi; nor shall the membership at any time be less than thirty-three and one-third percent (33-⅓%) non-Catholic. These percentage requirements are to be mandatory at all times and are to apply to both increases and decreases in the membership of this Foundation.

1c. Paragraphs 1a and 1b above of this Article III of the By-Laws of The John G. and Marie Stella Kennedy Memorial Foundation is hereby declared to be irrevocable.

ARTICLE XI

1. The John G. and Marie Stella Kenedy Memorial Foundation shall distribute each and every year a minimum of ten percent (10%) of the total charitable distributions for each said year to non-sectarian charities operating within the State of Texas.

2. All future charitable distributions of The John G. and Marie Stella Kenedy Memorial Foundation shall be made wholly within the State of Texas.

3. This Article XI of the By-Laws of The John G. and Marie Stella Kenedy Memorial Foundation is hereby declared to be irrevocable.

EXECUTED this __ day of _____, 19__.

_____, Secretary
The John G. and Marie Stella
Kenedy Memorial Foundation

(SEAL)

THE STATE OF TEXAS {
COUNTY OF JIM HOGG {

KNOW ALL MEN BY THESE PRESENTS: That The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under the laws of the State of Texas, joined herein by Jacob S. Floyd and Alice National Bank, a national banking association with its place of business in Alice, Texas, jointly acting herein only in their capacity as executors of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars ($10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation, Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas, (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in , under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

> 43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 519-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other minerals produced and saved from the above described lands.

This sale conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said Lands; provided, however, that this sale and conveyance, in so far as it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

GRANTEE	DATE OF INSTRUMENT	Recorded in Deed of Lease* Records of Jim Hogg County at VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1947	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars ($25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest conveyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above lands which provides (i) for a royalty of less than one-eighth (1/8th) of all oil produced, saved and sold, of less than one-eighth (1/8th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth (1/8th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of $10,000 or $2 per acre for the lands leased, whichever shall be

the lesser amount, (iii) for delay rentals in excess of $2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving

the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated _____ day of _____, 1963, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the _____ day of _____. 196 .

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION

By: _____
President

GRANTOR

ATTEST:

_____
Secretary

_____

ALICE NATIONAL BANK

By: _____
President

ATTEST:

_____
Cashier

Executors of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED

at 3:45 o'clock p.m.

SEP 1 1964

Pauline Clinkscales
Clerk District Court
Jim Wells County, Tex.

BY _____ DEPUTY

Entered November 28, 1979

IN THE DISTRICT COURT OF
JIM WELLS COUNTY, TEXAS
79TH JUDICIAL DISTRICT

No. 12,074

LEE H LYTTON, JR.
v.
THE JOHN G. AND MARIE STELLA
KENEDY FOUNDATION, ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 21st day of September, 1979 there came on to be heard the motion of the Honorable Mark White, Attorney General of the State of Texas, and others, for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, and the Court having heard all witnesses called by any party, and having read their written submissions and having fully considered the matter, it is the opinion of the Court that said motion should be granted; and

The temporary injunction referred to in Article VII of this Court's September 1, 1964 judgment as having theretofore issued out of the District Court of Kenedy County, Texas, 105th Judicial District, in Cause No. 85, styled *Arnold R. Garcia, Temporary Administrator of the Estate of Sarita K. East, Deceased*, against *The John G. and Marie Stella Kenedy Memorial Foundation, et al.*, having been dissolved and avoided with the dismissal with prejudice of that action on September 25, 1978, and all contests to the probate of the Will of Sarita K. East having been finally resolved and all other conditions to the entry of final judgment recited in *Gregory v. Lytton*, No. 14633 in the Court of Civil Appeals, San Antonio Division, having been fulfilled,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The motion for entry of final judgment and for dismissal of defendant Christopher Gregory's motion to set aside the interlocutory judgment previously entered herein on September 1, 1964, is granted in all respects.

2. The interlocutory injunctive provisions of Article V of the September 1, 1964 judgment are hereby vacated and dissolved and the said judgment is in all other respects reaffirmed and made final.

3. The John G. and Marie Stella Kenedy Memorial Foundation, the Alice national Bank of Alice, Texas, and the Estate of Sarita Kennedy East are hereby authorized and directed to take all steps necessary to execute, acknowledge, and deliver the instrument of assignment, in the form attached as Exhibit C to this Court's Judgment of September 1, 1964, as modified to take account of intervening events as shown by Exhibit A attached hereto, to the Sarita Kennedy East Foundation ("SKEF"), together with all royalty payments which have accrued thereon to SKEF and a proper accounting therefor.

4. This final judgment is without prejudice to the position of the respective parties concerning certain outstanding differences between them as to interest on such royalty payments and other matters concerning the proper interpretation of their settlement agreement.

5. All costs shall be taxed against the party incurring such costs for which execution shall issue if not timely paid.

RENDERED and SIGNED this 28th day of November, 1979.

s/ C.W. Lauglin
C.W. Lauglin
District Judge

THE STATE OF TEXAS {
COUNTY OF JIM HOGG {

KNOW ALL MEN BY THESE PRESENTS: that The John G. and Marie Stella Kenedy Memorial Foundation ("Grantor" herein), a non-profit corporation organized and existing under

the laws of the State of Texas, joined herein by Alice National Bank, a national banking association with its place of business in Alice, Texas, acting herein only in its capacity as executor of the Estate of Sarita K. East, deceased, for and in consideration of Ten Dollars ($10.00) cash and other good and valuable considerations in hand paid by the Sarita Kennedy East Foundation Inc., a non-profit corporation organized and existing under the laws of the State of New York ("Grantee" herein), the receipt and sufficiency of which are hereby acknowledged, have GRANTED, SOLD, CONVEYED and ASSIGNED, and do hereby GRANT, SELL, CONVEY and ASSIGN unto Grantee an undivided seven-eighths (7/8ths) interest in all oil, gas and other minerals owned by Sarita K. East at the time of her death according to the records of Jim Hogg County, Texas (said oil, gas and mineral interests of Sarita K. East having been acquired under her will and being now owned by Grantor), in, under and that may be produced and saved from the following described lands situated in Jim Hogg County, Texas, to-wit:

> 43,263.46 acres of land, more or less, known as the San Pablo Ranch and fully described in a royalty deed from Sarita K. East to Reverend K.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese, dated September 1, 1947, of record in Vol. 28, Pages 319-21 of the Jim Hogg County Deed Records,

and, in addition, an undivided seven-eighths (7/8ths) of all royalty interests owned by Grantor according to said records in all oil, gas and other materials produced and saved from the above described lands.

This sale and conveyance is expressly made, and is expressly accepted by Grantee, subject to all oil, gas and mineral leases now effective in respect of said lands, and any of them, but covers and includes seven-eighths (7/8ths) of all royalties payable under any and all of such oil, gas and mineral leases now in effect or hereafter executed in respect of said lands; provided, however, that this sale and conveyance, in so far as

it relates to an undivided seven-eighths (7/8ths) interest in said oil, gas and mineral interests owned by Sarita K. East at the time of her death, is further expressly made, and is further expressly accepted by Grantee, subject to (but said undivided seven-eighths (7/8ths) interest shall bear only its proportionate seven-eighths (7/8ths) part of) (i) all royalty interests assigned or conveyed of record in Jim Hogg County, Texas, by Sarita K. East prior to her death (but only to the extent such royalty interests shall be subsisting at any time in question) out of any portions of the lands hereinabove described in favor of any persons, including specifically but not limited to the royalty interests assigned or conveyed by the following instruments:

GRANTEE	DATE OF INSTRUMENT	Recorded in Deed or Lease* Records of Jim Hogg County at VOLUME	PAGE
E.B. Ledvina, Bishop of the Corpus Christi Roman Catholic Diocese	September 1, 1947	28	519 et seq.
Stella Lytton	September 1, 1947	28	532 et seq.
Stella Lytton	September 1, 1947	28	530 et seq.
Stella Lytton	February 28, 1955	39*	103 et seq.
Stella Lytton	June 22, 1956	41*	267 et seq.
Stella Lytton	May 22, 1957	38*	519 et seq.
L.E. Turcotte	September 1, 1947	28	534 et seq.
L.E. Turcotte	September 1, 1947	28	536 et seq.
L.E. Turcotte	February 28, 1955	39*	101 et seq.
L.E. Turcotte	June 22, 1956	41*	269 et seq.
L.E. Turcotte	May 22, 1957	38*	522 et seq.
Irene Putegnat	October 19, 1947	28	525 et seq.
Irene Putegnat	September 1, 1957	28	527 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	91 et seq.
Fannie D. Putegnat, et al	June 25, 1952	37*	93 et seq.

and (ii) those two certain annual lifetime annuities of Twenty-Five Thousand Dollars ($25,000.00) payable in equal monthly installments to each, respectively, of Stella Turcotte Lytton and Louis Edgar Turcotte out of the first royalties accruing monthly to Grantor and to Grantee from production under any presently existing or future oil and gas leases upon the above described lands as provided under Article III of the Will of Sarita K. East, deceased, as amended under Second of the Fourth Codicil to said Will. Delivery of payment of all royalty deliverable or payable to Grantee shall be made in the same manner as is provided for the delivery of payment of royalties to Grantor under any present or future mineral lease affecting said lands.

Grantor, for itself and its successors and assigns, hereby reserves and hereby excepts from the interest convyed to Grantee hereunder, subject to the further provisions hereof, all rights in respect of the development of said hereinabove described lands for the production of oil, gas and other minerals, and all rights in respect of any subsequent leasing of said hereinabove described lands or any portion thereof, without the necessity of any joinder by Grantee, for the development of oil, gas or other minerals, and all rights to receive the entirety of any amounts which may be receivable under such lease either as bonus monies or delay rentals. It is hereby further expressly agreed and understood between Grantor and Grantee that Grantor, its successors and assigns, shall not make any oil, gas or mineral lease in respect of any of the above described lands which provides (i) for a royalty of less than one-eighth (1/8th) of all oil produced, saved and sold, of less than one-eighth (1/8th) of the value of all gas produced, saved and sold, or used for commercial purposes and of less than one-eighth (1/8th) of the value of any other minerals produced from said premises and sold or used for commercial purposes, (ii) for a bonus, whether present or deferred, in excess of $10,000 or $2 per acre for the lands leased, whichever shall be

the lesser amount, (iii) for delay rentals in excess of $2 per acre per year, or (iv) for pooling for any purposes of any lands subject to any such lease with any other lands except that Grantee through its acceptance hereof agrees that it will not unreasonably refuse to enter into any such pooling agreements in regard to the herein described lands as may be approved for execution by Grantor, its successors and assigns. In the event oil, gas or other minerals are produced from the above described lands, or any part thereof, by Grantor, its successors and assigns, other than under a lease or leases, Grantee shall be entitled to receive a free royalty upon such production equivalent to the fraction or portion herein conveyed to Grantee of the minimum royalties above stated, i.e. seven-eighths (7/8ths) of one-eighth (1/8th).

The interest herein sold and conveyed to Grantee shall cease, terminate and revert to Grantor, its successors and assigns, when Grantee shall have received from the gross proceeds of production attributable to such interest (it being expressly understood and agreed in this connection that production attributable to such interest shall not include production attributable to the aforementioned existing royalty or annuity interests to which the interest herein conveyed may now be subject, nor shall it include production attributable under any circumstances to the interest retained by Grantor hereunder or to the interest of any lessee) an aggregate sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00); provided, however, if any of the proceeds of the interest herein conveyed to Grantee shall be withheld for any reason involving the title to the interest herein conveyed to Grantee then Grantee shall not be deemed to have received or realized any such proceeds from the interest until, and only to the extent that, the proceeds from the sale thereof have actually been received by Grantee, or if, at any time whatsoever either before or after the receipt of the full aggregate sum of such amount, Grantee shall be compelled, for any reason involving

the title to the interest herein conveyed to Grantee, to make any payment or restitution on account of proceeds theretofore received by Grantee, then, at the time any such payment or restitution is made, the said aggregate sum shall from the date of such payment or restitution be increased by an amount equal to such payment or restitution; and provided, further, that following the receipt by Grantee of such aggregate sum (as the same may be increased on account of any payment or restitution by Grantee of any of the proceeds of such mineral interest), the reversionary interest in any such amounts withheld from, or as to which payment or restitution from Grantee may be required, shall accrue to Grantor, its successors and assigns. No loss or failure of title shall have the effect of reducing the aforesaid sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00).

Grantee, its successors and assigns, shall be responsible for and agrees to hold Grantor harmless from the payment of ad valorem, gross production, severance, gift, inheritance and any and all other taxes of whatsoever kind or character now existing or hereafter levied which may in any manner be attributable to the interest herein sold and conveyed to Grantee.

It is expressly understood and agreed by and between Grantor and Grantee herein that this transfer and conveyance is made pursuant to the terms of the Judgment of the District Court of Jim Wells County, Texas, in Cause No. 12,074, styled Lee H. Lytton, Jr., et al vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al, dated 1st day of September, 1964, and the Final Judgment in said Cause entered in November 1979, and that in the event the interest herein assigned and conveyed to Grantee fails to yield or pay or accrue to Grantee, the full sum of Fourteen Million Four Hundred Thousand Dollars ($14,400,000.00), then and in that event, Grantee shall have no recourse upon Grantor or the executors of the Estate of Sarita K. East, deceased, for any further sums of money or interest whatsoever.

TO HAVE AND TO HOLD the above described mineral interest, together with all and singular the rights and appurtenances of every kind and character thereto in any wise belonging without limitation other than as herein expressly provided, unto Grantee, its successors and assigns, and Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the said mineral interest herein sold and conveyed to Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under Grantor.

Anything herein to the contrary notwithstanding, it is understood and agreed that in the event Grantee herein shall assign or transfer (not including any mortgage or similar encumbrance) the interest conveyed herein by Grantor to Grantee or any portion thereof, then and in such event the restrictions and limitations with respect to the amount of bonuses and delay rentals and provisions in regard to pooling set forth in clauses (ii), (iii) and (iv) on page 4 hereof shall not apply.

Grantor, for itself, its successors and assigns, hereby agrees that if all or any portion of said above described lands shall for any reason cease to be subject to the terms of any oil, gas and other minerals lease, whether as a result of the termination of any present or future oil, gas and other minerals lease, it will not unreasonably refuse to execute another oil, gas and mineral lease of the nature hereinabove contemplated on such unleased premises.

This instrument is subject to certain letter agreement dated February 20, 1964.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its officers, hereunto duly authorized, and to be affixed with its corporate seal, this the day of 1979, as of the 1st day of April, 1962.

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION
By: _____
President

ATTEST:

_____
Secretary

GRANTOR

ALICE NATIONAL BANK
By: _____
President

ATTEST:

_____
Cashier

Executor of the Estate of
Sarita K. East, Deceased,
February 11, 1961

FILED
at 4:06 o'clock p.m.
NOV 28 1979
Manuel M. Perez
Clerk District Court
Jim Wells County, Tex.
BY _____ DEPUTY

CHRISTOPHER GREGORY,

APPELLANT,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS Et Al.,

APPELLEES.

No. 16482.

COURT OF CIVIL APPEALS OF TEXAS,

SAN ANTONIO.

July 25, 1980.

OPINION

MURRAY, *Justice.*

This is an appeal by Christopher Gregory, also known as Brother Leo, from a judgment entered by the 79th Judicial District Court of Jim Wells County, Texas. The judgment in this cause determined who was entitled to serve as members and directors of The John G. and Marie Stella Kenedy Memorial Foundation, which was established by Sarita K. East prior to her death on February 11, 1961. This appeal represents the latest installment in the East will litigation, which began in the early 1960's.[1] The present suit was instituted in 1961 and was settled by agreement in 1963. The settlement agreement, reduced to writing and signed by all of the parties, was incorporated in a judgment on September 1, 1964. The judgment was expressly made interlocutory pending the outcome of two suits in which claims against the East estate were being adjudicated. Approximately eighteen months after the interlocutory judgment was rendered the appellant filed a petition in the nature of a bill of review to set it aside. The trial court dismissed the petition reasoning that the

[1] As pointed out by the supreme court in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), there have been numerous appeals involving the East estate. *See id.* at 684 n.1.

order was not a final judgment and was therefore not properly the subject of a suit in the nature of a bill of review. On appeal this court affirmed the trial court's action dismissing the appellant's petition. *See Gregory v. Lytton*, 422 S.W.2d 586, 591 (Tex.Civ.App.—San Antonio 1967, writ ref'd n.r.e.)[2]

On July 24, 1979, the appellees filed a motion for the entry of final judgment arguing that the supreme court's decision in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978), removed the last obstacle to making the September 1, 1964, judgment final. Subsequently, on September 14, 1979, the appellant filed a first amended motion to set aside the interlocutory judgment contending that the settlement agreement upon which the judgment was based is void for the following reasons: lack of authority, duress, failure of condition precedent, and because he no longer consented to the agreement.[3]

After a hearing the trial court granted the appellees' motion for the entry of final judgment. It is from this judgment that the appellant has perfected an appeal.

By several points of error the appellant contends that the trial court erred in entering a final judgment because (1) he notified the court prior to the entry of final judgment that he had withdrawn his consent to the settlement agreement; and (2) his consent to the settlement agreement was conditional and the condition has not been met.

[1, 2] A valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement the judgment of the court, the trial judge has knowledge that one of the parties to the suit has withdrawn his consent. Moreover, an agreed judgment should not be entered if the trial judge possesses information that would reasonable prompt further

[2] The background of this case is fully set out in *Gregory v. Lytton*, and will not be repeated here. We will, of course, provide additional facts necessary for an understanding of the disposition of this appeal.

[3] Appellant's original motion to set aside the interlocutory judgment was filed on August 1, 1968.

inquiry, and this inquiry, if pursued, would disclose a lack of consent. *See Burnaman v. Heaton*, 150 Tex. 333, 339, 240 S.W.2d 288, 291-92 (1951).

[3] Once a settlement contract, agreed to by all of the parties to the suit, is incorporated in a judgment of the court, however, a party is precluded from attacking the validity of the judgment in the absence of an allegation and proof of fraud or collusion. This rule is simply an application of the general principle that one cannot complain of that to which he has agreed. *See De Lee v. Allied Finance Co.*, 408 S.W.2d 245, 247 (Tex.Civ.App.—Dallas 1966, no writ). In the instant case the evidence conclusively establishes that the appellant signed the settlement agreement and that the judge had no reason to know of any dissatisfaction that the appellant might have had with the agreement at the time the interlocutory judgment was rendered.

[4] There is no justification either in law or logic for applying a different rule to agreed interlocutory judgments than to agreed final judgments. An agreed interlocutory judgment would be of little value if its terms could be avoided by the withdrawal of consent of one of the parties. Accordingly, we hold that the above-stated principles governing agreed judgments apply to all consent judgments whether interlocutory or final.

[5] In support of his assertion that he never consented unconditionally to the settlement agreement the appellant relies on his own testimony adduced at the hearing on the appellees' motion for entry of final judgment. In this regard he testified that he was told by his superior that if he did not sign the agreement he would be excommunicated from the Catholic Church. He subsequently consulted another superior who suggested that he sign the document and attach to it a cover letter to the Holy See in Rome, which would require the Holy See's written approval before the settlement agreement was released to the court.

The appellant argues that his lawyers were not authorized to effect the settlement agreement since he had conditioned his consent on the approval of the Holy See and the condition has not been met. We disagree.

In April of 1961 the Houston, Texas, law firm of Baker & Botts was retained to represent the appellant and others, including The John G. and Marie Stella Kenedy Memorial Foundation. Thereafter, in 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.

The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communicate to his attorneys the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. *See Allsman v. Robinson*, 25 S.W.2d 237, 239 (Tex.Civ.App.—El Paso 1930, no writ).

For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court.

CADENA, *Chief Justice, dissenting.*

There can be no quarrel with the holding by the majority that a consent interlocutory judgment cannot be set aside if it was entered prior to the time that the consent of one of the

parties was revoked. But appellant in this case complains of the fact that the trial court entered a final judgment without a hearing on the merits after he had made known to the court that he had withdrawn his consent to the agreement on which the agreed interlocutory judgment was based.

The authorities cited in the majority opinion hold that a valid consent judgment cannot be rendered if, at the time the court undertakes to make the agreement of the parties the judgment of the court the trial judge has knowledge that one of the parties to the agreement has withdrawn his consent or if, prior to rendition of the judgment, the trial court has knowledge of facts which would reasonably prompt further inquiry and such inquiry would disclose the lack of continued consent. It is clear in this case that, at the time the final judgment was rendered, the trial court was fully aware of the fact that appellant had revoked his consent. While it is true that at the time the interlocutory order was rendered the trial court had no reason to suspect that appellant was dissatisfied with the agreement, this fact can justify no more than a holding that the interlocutory order was properly rendered.

Since appellant did not consent to the rendition of the final judgment, basing such judgment on the repudiated agreement was clearly error. *Burnaman v. Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951).

CHRISTOPHER GREGORY,

APPELLANT,

v.

LEE H. LYTTON, JR., Et Al.,

APPELLEES.

No. 14633.

COURT OF CIVIL APPEALS OF TEXAS.

SAN ANTONIO.

Nov. 1, 1967.

Rehearing Denied Dec. 27, 1967.

KLINGEMAN, *Justice.*

This is an appeal from an order dismissing a petition in the nature of a bill of review in Cause No. 13850 in the District Court of Jim Wells County, 79th Judicial District, which bill of review was filed by appellant, Christopher Gregory, also referred to as Brother Leo, to review and set aside an order in Cause No. 12074, dated September 1, 1964, in the same court.

Appellant's only point of error is that the trial court erred in holding that the judgment in cause No. 12074 "is an interlocutory judgment and not a final judgment, and for such reason is not properly the subject of a suit in the nature of an equitable bill of review, and by reason of such holding in dismissing plaintiff's said suit for bill of review."

The principal question to be determined by this Court is whether the judgment of September 1, 1964, is interlocutory, and therefore not subject to bill of review, although appellee Bishop Drury has a counterpoint to the effect that even if the judgment in Cause No. 12074 was final, which he asserts is not the case, the record on its face shows that such judgment is based on a contract dated October 28, 1963, containing strict provisions for specific performance, and the bill of review of appellant filed on March 8, 1966, is thereby barred by limitation and laches.

The controversy involves the properties and affairs of Sarita K. East, who died on February 11, 1961. Prior to her death, Mrs. East organized and had incorporated under the Texas Non-Profit Corporation Act, the John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member thereof, but under date of February 11, 1960, Mrs. East appointed Jacob S. Floyd and Lee H. Lytton, Jr., as co-members of such foundation. Sometime thereafter she requested and received their resignations as members. On

December 30, 1960, Mrs. East made an additional appointment of Christopher Gregory as co-member during her lifetime. The will of Sarita K. East, dated January 22, 1960, in addition to devises to a number of relatives and former employees, left the residue of her estate to her foundation. A First codicil to said will, bearing the same date as the will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi as her successor to membership in such foundation upon her death. Thereafter, Mrs. East made Second, Third, Fourth and Fifth Codicils to such will, and under the Third Codicil revoked the First Codicil and appointed Peter Grace, Christopher Gregory and Father Patrick J. Peyton as successor members to her after her death. In such will Edgar Turcotte, Jacob S. Floyd and Alice National Bank were named executors. A contest to such will was filed in Kenedy County by Raul Trevino and others claiming to be blood heirs at law of Sarita K. East, and such will contest was pending at the time of the judgment of September 1, 1964. There was also pending at such time a suit in the District Court of Kenedy County to set aside certain inter vivos deeds from Sarita K. East to The John G. and Marie Stella Kenedy Memorial Foundation, and an injunction had issued out of the District Court of Kenedy County, Texas, in Cause No. 85, styled Arnold R. Garcia, Temporary Administrator of the Estate of Sarita Kenedy East, Deceased v. The John G. and Marie Stella Kenedy Memorial Foundation et al., wherein the parties thereto were enjoined from disposing or transferring certain purported assets of the foundation pending determination of the action.

Cause No. 12074 was commenced on the 19th day of April, 1961, by Lee H. Lytton, Jr., complaining of The John G. and Marie Stella Kenedy Memorial Foundation and others, including appellant, in which petition plaintifff asked that a temporary injunction issue pending trial of the case, enjoining appellant and others from withdrawing funds from the foun-

dation, from executing any contracts affecting certain lands, and other injunctive relief, and that on final hearing the court enter its declaratory judgment that Lytton and Jacob S. Floyd were the only legal members of the foundation; that defendants Gregory and Grace be required to file an accounting with the court and to return to the defendant foundation any assets received by them as a result of undue influence practiced by them on Mrs. East, and other relief. Thereafter, various answers, cross-actions, amended pleadings, and petitions of intervention were filed in said case by various parties, some of them seeking relief similar to that asked by plaintiff Lytton. The temporary injunctive relief prayed for was granted by the court, and the temporary injunction was continued from time to time. As a result of motions to strike, the plea of intervention filed in said cause by Raul Trevino et al., was stricken and dismissed from said cause, and the defendants in intervention, Alice National Bank, Edgar Turcotte and Jacob S. Floyd as Executors of the Estate of Sarita K. East, deceased, were dismissed from said suit insofar as said petition in intervention was concerned. An appeal therefrom was taken by Raul Trevino et al., and the Waco Court of Civil Appeals dismissed such appeal on the basis that it was not an appeal from a final judgment. Kimmel v. Lytton, Tex.Civ.App., 371 S.W.2d 927 (1963, writ ref'd).

On September 1, 1964, the trial court entered the order from which appellant sought a bill of review. The order recites that all parties to such action have approved the judgment, and on such judgment under the heading "Approved as to Form and Substance" is found the signature of appellant, Christopher Gregory, together with the signatures of other parties and attorneys in said cause. The order decrees certain people, not including appellant, to be the present and only legally authorized and elected members, directors, and officers of The John G. and Marie Stella Kenedy Memorial Foundation; confirms and ratifies certain amendments to the

Articles of Incorporation of such Foundation; vacates and dissolves temporary restraining orders theretofore issued; enjoins and restrains all parties from disposing of, dissipating, removing from the territorial limits of the State of Texas, or expending any money or royalties heretofore or hereafter received by the Foundation under three instruments described in such order, with certain exceptions as to payment of taxes, etc.; dismisses various parties to the suit; recites that a temporary injunction has heretofore issued out of the District Court of Kenedy County, Texas, as a result of which the parties hereto have refrained from executing and delivering an assignment of a production payment in oil, gas and other minerals in certain lands, from the John G. and Marie Stella Kenedy Memorial Foundation to the Sarita Kenedy East Foundation, Inc., a copy of which instrument is attached to the judgment as an Exhibit, and the proper parties are authorized to execute, acknowledge, and deliver such assignment upon the vacation or avoidance of such temporary injunction hereinabove provided for. Said judgment further recites: "This is an interlocutory order and shall remain in full force and effect until further ordered by this Court," and provides that "All costs of suit shall abide the issue."

Appellant contends that the judgment of September 1, 1964, did dispose of all issues and parties in the case; that the injunction and order authorizing and directing a future act were merely incidental to the main relief granted; that the word "interlocutory" as used in such judgment was merely intended to show that the injunction therein issued was temporary in nature and would be dissolved by further order of the court when no longer necessary; that the mere fact that disposition of costs remain to be determined does not prevent a judgment from being final; and that evidence aliunde the judgment and pleadings in such cause is not determinative of the finality of such judgment. Appellant cites a number of cases in support of his contention, but, insofar as we have been

able to ascertain, none of such cases involved an agreed judgment and in none of them was it expressly stated by the trial court that the judgment was interlocutory.

Appellees contend that the judgment was not final because: (1) It was expressly stated otherwise in such judgment. (2) The order was interlocutory in its nature. (3) Further action of the court of some kind or character is contemplated and actually indispensible. (4) The costs of suit were left open and not taxed or paid. (5) The court itself, in addition to signing the order containing the language that it was interlocutory, made a docket entry indicating that the order was interlocutory and not final. (6) The clerk of the court continued to carry such case as an active case and not as a case closed by final judgment. (7) Some of the parties to such suit continued to file additional pleadings and other papers in said cause after the entry of the judgment. (8) The order standing alone is interlocutory in nature, but that such order expressly refers to a collateral settlement agreement which should be approved and judgment entered in accordance with such settlement agreement, which was admittted into evidence as an exhibit, makes the judgment in Cause No. 12074 contingent on the results of the will contest in Kenedy County, and when such judgment of September 1, 1964, is construed with the collateral agreement it is obvious that the judgment under attack is interlocutory and not final.

[1] The general rule is that a judgment to be final must dispose of all issues and parties in a case. North East Independent School District v. Aldridge, 400 S.W.2d 893 (Tex.Sup.1966); Hargrove v. Insurance Inv. Corp., 142 Tex. 111, 176 S.W.2d 744 (1944). But, as stated by Justice Calvert in North East v. Aldridge, supra, "The rule is deceiving in its apparent simplicity and vexing in its application." In 4 McDonald, Texas Civil Practice § 17.03 (1950), it is stated: "There is a great body of precedent upon the difficult question of whether a particular decision of the court represents a 'final' or an 'interlocutory' judgment. * * * It thus frequently becomes a problem in construction to determine whether the

particular decision was 'final' for the purpose of the question before the court. This problem must be resolved by a determination of the intention of the court gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties."

It appears clear that the court intended that such judgment be interlocutory, because not only does it expressly state so in such judgment, but in the judgment dismissing appellant's bill of review in the case on appeal the trial court makes findings, among others, that it was the intention of the parties and the court to enter a temporary order; that "The word 'interlocutory' contained in the temporary order entered in Cause No. 12,074 was used with cautious and deliberate design;" that by said wording the temporary order entered in said cause was expressly made interlocutory in its entirety.[1] As to the intentions and conduct of the parties, such judgment

[1] Other findings made by the court were: "(1) that at the time the temporary order was entered there was pending a contest of the Last Will and Testament of Sarita K. East, Deceased, being Cause No. 348 (hereinafter called the 'will contest') on the docket of the county Court of Kenedy County, Texas; (2) that the parties and this court in Cause No. 12,074 clearly recognized that the outcome of the will contest might substantially affect Cause No. 12,074 because the Last Will and Testament of Sarita K. East, Deceased, under attack in said will contest, devises and bequeaths her residuary estate to The John G. and Marie Stella Kenedy Memorial Foundation (hereinafter called the 'Foundation'); (3) that because the will contest involved assets of Sarita K. East, Deceased, which may, or may not be, ultimately administered by the Foundation, neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in said Cause No. 12,074; (4) that at the time the temporary order was entered there was also pending a suit to set aside certain inter vivos deeds from Sarita K. East, Deceased, to the Foundation, the same being Cause No. 85, styled Arnold R. Garcia vs. The John G. and Marie Stella Kenedy Memorial Foundation, et al. on the docket of the District Court of Kenedy County, Texas, 105th Judicial District (hereinafter called the 'deed suit'); (5) that the parties and this Court in Cause No. 12,074 recognized that the outcome of the deed suit might substantially affect Cause No. 12,074 because said deed suit involves a substantial portion of the Foundation

of September 1, 1964, recites that all parties to such action have approved the same, and the judgment contains the signatures of appellant and other parties and attorneys in such suit. The record reflects that the court made a docket entry that such order was interlocutory; that on the docket of such court said case was continued to be carried as an active case, and after the date of such judgment there were entries made on different occasions, such as "passed," and that some of the parties continued to file additional pleadings in the case.

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assets; (6) that consequently neither the parties nor the Court on September 1, 1964, intended to have entered a final judgment in Cause No. 12074, due to the bearing of the deed suit upon said Cause No. 12,074; (7) that there existed the possibility of a number of issues or the entire action in Cause No. 12,074 being rendered moot if Plaintiffs in both the will contest and the deed suit were successful; (8) that the parties in Cause No. 12,074, intended to enter a temporary order which may become a final judgment in the event Plaintiffs in both the will contest and the deed suit are unsuccessful, but the parties in Cause No. 12,074 did not intend to provide for alternative judgments based upon other possible results in the will contest and the deed suit; (9) that although the temporary order entered in Cause No. 12,074 might lead to a final judgment, the outcome in the will contest and deed suit must first be known; (10) that it was the intention of the parties and the Court to enter a temporary order only in Cause No. 12074 because of the various contingencies herein described; (11) that the settlement agreement executed by the parties and the agreed temporary order entered pursuant thereto in Cause No. 12,074 recognizes the possible effect which the will contest and the deed suit might have on any future final judgment in Cause No. 12,074 included in the temporary order a temporary injunction enjoining the parties from 'disposing of, dissipating, removing from the territorial limits of the State of Texas, or spending any monies and/or royalties heretofore or hereafter received by The John G. and Marie Stella Kenedy Memorial Foundation, its officers, directors, members, agents, employees and representatives * * *,' which temporary injunction is still in full force and effect; (13) that the court therefor provided in its temporary order in said Cause No. 12,074, that all costs of suit would not be taxed until every entry of final judgment; and (14) that some of the parties amended their pleadings subsequent to the entry of the temporary order in Cause No. 12,074, * * *."

[2] This Court in Culicchia v. Taormina, Tex.Civ.App., 332 S.W.2d 803, 804 (1960, no writ), stated:

> "In determining whether the judgment was a final one, we are limited largely to what the court stated by the judgment, and what might have been or could have been done is not the issue. There may be more than one way to write a judgment in an accounting suit, but we need only to determine what was done in this case.
>
> "The judgment was carefully drawn and shows painstaking care in disposing of complex accounting problems. Throughout the judgment, the court makes rather clear what was intended, and while it is true that an instrument is what it is, without regard to the label appended to it, when a judgment contains words and internal evidences of its nature, we will not ignore them. * * * "

See also the recent case of State v. Starley, 413 S.W.2d 451 (Tex.Civ.App.—Corpus Christi, 1967).

[3] In addition to the express statement in the judgment by the trial court to the effect that "This is an interlocutory order and shall remain in full force and effect until further ordered by this court," there are certain judicial acts to be performed by the trial court in said cause in the future. At some future date, it will be necessary for the trial court to act upon the temporary injunction provided for in such order, to assess all costs of suit, and to determine the effect of any change in the temporary injunction issued in the District Court of Kenedy County. See 33 Tex.Jur.2d Judgments § 85 (1962).[2]

---

[2] "A final judgment is one that determines the rights of all the parties to the suit, and disposes of all the issues involved on their merits. Thus, a judgment is final where no further action adjudicating the rights of the parties may be taken by the court. But to constitute a final judgment it is not sufficient that the court has made a ruling that should logically lead to final disposition of the cause; the consequence of the ruling to the parties must be also declared. The very object of a suit is to adjudicate and declare respective rights so that

It is our opinion that appellees' counterpoint to the effect that the trial court correctly held that the judgment in Cause NO. 12074 is interlocutory and not the subject to attack by Bill of Review and appellant's suit was properly dismissed, should be sustained. In view of such holding, we do not pass upon appellee Father Drury's counterpoint that the Bill of Review of appellant is barred by limitation and laches.

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

IN THE SUPREME COURT OF TEXAS

No. B-9856

CHRISTOPHER GREGORY

vs.

MARK WHITE, ATTORNEY GENERAL Et Al

FROM JIM WELLS COUNTY,

FOURTH DISTRICT.

November 26, 1980

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Christopher Gregory and his surety Fidelity and Deposit Company,

pay all costs incurred on this application.

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the ministerial officers can with certainty carry the judgment into execution without the ascertainment of additional facts; where this is not the case the judgment is not final."

IN THE SUPREME COURT OF TEXAS

No. B-9856

CHRISTOPHER GREGORY

vs.

MARK WHITE, ATTORNEY GENERAL Et Al

FROM JIM WELLS COUNTY,

FOURTH DISTRICT.

January 7, 1981

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

First telegram from Thomas Keating to Robert Jewett.

Dated: August 30, 1964

I, the undersigned as the superior of Christopher Gregory (Brother Leo)

In virtue of an understanding which I have with him hereby authorize you to take the steps necessary to effectuate the settlement which the said Christopher Gregory has to here for sign the cause pending in the district court of Jim Wells County State of Texas 79th Judicial District Number 12074. Thomas Keating Abbot of St. Joseph's Abbey Spencer Mass.

Second telegram from Thomas Keating to Robert Jewett.

Dated: August 31, 1964

Regarding telegram Aug 31 from Spencer Mass signed Thomas Keating Abbot of St. Joseph's Abbey Spencer Mass.

Herewith duplicate and corrected copy of text, quote, I the undersigned as the superior of Christopher Gregory (Brother W. Leo) in virtue of an understanding which I have with him hereby authorize you to take the steps necessary to effectuate the settlement which the said Christopher Gregory has heretofore signed in the cause pending in the district court of Jim Wells County State of Texas 79th Judicial District Number 12074, unquote.

MONASTERIO CISTERCIENSE
CASILLA 169
LAS CONDES, CHILE

June 5, 1964

Mr. Kenneth Oden
Perkins, Floyd, Davis & Oden
Alice National Bank Building
Alice, Texas

Dear Ken:

This is to advise you that I hereby revoke and withdraw my approval and consent to the Settlement of the issues in the case of Lytton v. Kenedy Memorial Foundation. Such consent as I have given has been within the context of ecclesiastical influences very significant in my monastic life, of course, but unintelligible in the context of civil law and my natural law obligations towards the Kenedy East Foundation.

I also wish to advise you that neither Baker Botts, Shepherd and Coates of Houston or Cahill, Gordon, Reindel and Ohl have been acting as my attorney and are not authorized to speak for me.

Very truly yours,

BROTHER W. LEO

December 9, 1964

Kenneth Oden, Esq.
Perkins, Floyd, Davis & Oden
P.O. Drawer 331
Alice, Texas 78332

Dear Mr. Oden:

I have reviewed the copy of the judgment in *Lytton* v. *Kenedy Memorial Foundation, et al* which you sent me. After careful study of same, I find it necessary to bring to your attention the enclosed copies of two documents which I feel quite strongly should be called to the Court's attention. In view of the terms of the settlement and the fact that my client left these documents with me and is incommunicado, I have a professional obligation to see that the Court is advised that Brother Leo did not freely agree to the terms of the settlement and that he was not represented by counsel of his own choice in connection therewith. I would appreciate, therefore, hearing from you as soon as possible on this matter.

Very truly yours,

WILLIAM R. JOYCE, JR.

Enc.: 2
WJR:lkk

CURTIS, MALLET-PREVOST, COLT & MOSLE

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MEXICO CITY OFFICE
AVENIDA JUAREZ 14
DESPACHOS 802-806
TELEPHONE 21-53-54

December 11, 1964

Leroy Denman Moody, Esq.
Messrs. Baker, Botts, Shepherd & Coates
Esperson Building
804 Travis Street
Houston 2, Texas

Dear Sir:

I am enclosing herewith a copy of a letter and its enclosures I mailed to Mr. Kenneth Oden on December 9, 1964 in connection with the lawsuit *Lytton* v. *Kenedy Memorial Foundation, et al.* In view of the representations made in the settlement submitted to the District Court in Alice, Texas in connection therewith, I find it necessary to call this matter to your attention immediately, and I would appreciate hearing from you as soon as possible on this matter.

Very truly yours,

s/ WILLIAM R. JOYCE, JR.
WILLIAM R. JOYCE, JR.

Enclosures
WRJ:lkk

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,

Petitioner,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, LEE H. LYTTON, JR., BISHOP THOMAS J. DRURY, ELENA S. KENEDY, B. R. GOLDAPP, KENNETH ODEN AND ALICE NATIONAL BANK, INDEPENDENT EXECUTOR OF THE ESTATE OF SARITA K. EAST, DECEASED, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KENNETH ODEN
PERKINS, ODEN, WARBURTON,
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P. O. Drawer 331
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Counsel for Respondents,
THE JOHN G. AND MARIE
STELLA KENEDY
MEMORIAL FOUNDATION, ET AL.

May 21, 1981

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Ecclesiastical rules of the Roman Catholic Church were not involved in the decisions and judgments of the courts of the State of Texas and the record in this case reflects that the Texas courts relied only upon applicable principles of Texas law in reaching their decisions.

2. The record in the case clearly reflects that Petitioner was afforded a trial upon the issues raised by the pleadings then before the court, and Petitioner failed to demonstrate that he was entitled to a jury at such trial under Texas laws and procedures.

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No. 80-1677

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v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, LEE H. LYTTON, JR., BISHOP THOMAS J. DRURY, ELENA S. KENEDY, B. R. GOLDAPP, KENNETH ODEN AND ALICE NATIONAL BANK, INDEPENDENT EXECUTOR OF THE ESTATE OF SARITA K. EAST, DECEASED, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The Judgment of the Supreme Court of Texas refusing Petitioner's application for a writ of error, which was without opinion and is not reported, is set forth at A-47.* The opinion of the Texas Court of Civil Appeals is reported at 604 S.W. 2d 402 (Tex. Civ. App. — San Antonio 1980, writ ref'd. n.r.e.) (A-34-

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*The appendix to the petition is abbreviated throughout this brief as "A- ".

38). The Judgment of the trial court was rendered without opinion (A-24-33).

Counter-Statement of the Case

History of this case

During her lifetime, Mrs. Sarita K. East, a Texas resident, caused to be incorporated under the Texas Non-Profit Corporation Act, The John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member, but in February, 1960, she appointed Jacob S. Floyd and Lee H. Lytton, Jr., both residents of the State of Texas, as co-members of such Foundation. Sometime thereafter she requested and received their resignations as members. In December 1960, Mrs. East appointed Petitioner, a Trappist monk based in Spencer, Massachusetts, as a co-member. The Will of Sarita K. East, dated January 22. 1960, left the residue of her estate to her Foundation. A First Codicil to said Will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi, Texas, as her successor to membership in such Foundation upon her death. Thereafter, from time to time, Mrs. East made additional codicils to such Will, and under the Third Codicil, she revoked the First Codicil which named the Corpus Christi Bishop, and appointed Petitioner, Peter Grace and Father Patrick J. Peyton as successor-members to her after her death.

In February 1961, Mrs. East died in New York City and, thereafter, in April 1961, Lytton (later joined by Floyd) filed this suit against Peter Grace, Father Peyton, Thomas Doyle and J. J. Meehan, all residents of the State of New York, the Foundation and Petitioner. The Attorney General of Texas was later joined in the suit as an indispensable party. Lytton and Floyd alleged generally that their respective resignations as members of the Foundation were obtained as a result of undue influence exerted upon Mrs. East by Petitioner, et al, and that the revocation of the First Codicil appointing the Corpus Christi

Bishop and the December 1960 appointment of Petitioner as a member of the Foundation were also procured as a result of undue influence practiced upon Mrs. East by Petitioner, et al.

Thereafter, a contest of the Will and Codicils of Mrs. East was filed by her heirs-at-law on July 25, 1962. While the will contest was pending, under date of October 28, 1963, a settlement agreement was fully executed in this case and on September 1, 1964, an agreed interlocutory judgment (A-1) was entered by the court upon such settlement agreement.

Some one and one-half years after the entry of the Judgment, Petitioner gave to the trial court his first notice of his claim of non-consent by the filing of his Application for Bill of Review on March 8, 1966, seeking to set aside the agreed Judgment. The Bill of Review was dismissed and the Court of Civil Appeals affirmed. (A-38-47) Thereafter, Petitioner filed his motion in this cause on August 1, 1968, to set aside such agreed Judgment.

Subsequently, in the year 1978, the will contest was terminated[1] and except for the pendency of Petitioner's motion to set aside the agreed Judgment, the time had come for the trial court to make such Judgment a final one. Therefore, on July 24, 1979, the Attorney General of Texas, et al filed a motion for the Entry of Final Judgment and to Dismiss Petitioner's Motion to Set Aside the Interlocutory Judgment. A trial upon that motion, held on September 1, 1979, resulted in Final Judgment making the interlocutory judgment final and dismissing Petitioner's motion to set aside the interlocutory judgment. (A-24)

At the trial court level, Petitioner essentially took the position that even though he had signed the settlement agreement and agreed interlocutory judgment, yet he did not consent at the time of the hearing to the entry of Final Judgment, and, therefore, such Judgment could not be made final. On appeal, the Texas Court of Civil Appeals held that the evidence conclusively

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[1] Trevino, et al v. Turcotte, et al, 564 S.W. 2d 682 (Tex. Sup.)

established that Petitioner signed the settlement agreement and that the Judge had no reason to know of any dissatisfaction which Petitioner might have had with the agreement at the time the interlocutory judgment was rendered and that since the trial court had no knowledge of any lack of consent prior to entry of the interlocutory order, Petitioner could not prevent final judgment by attempting to later withdraw his consent. In connection with Petitioner's claim of conditional delivery of the settlement agreement and agreed Judgment, the Court of Civil Appeals noted that "neither the Appellant's (Petitioner's) attorneys, the attorneys for the Appellees, the trial Judge, nor any of the other parties to the suit knew of the conditional nature of his consent until several months after the Judgment was rendered." (A-34) The Supreme Court of Texas refused to review the decision of the Court of Civil Appeals. (A-47)

Reasons for Denying the Writ

1.

NO FEDERAL QUESTIONS WERE PRESENTED TO THE TEXAS COURTS FOR DETERMINATION AND THE TEXAS COURTS RELIED ONLY UPON APPLICABLE PRINCIPLES OF TEXAS LAW IN REACHING THEIR DECISIONS.

It is not true, as stated by Petitioner, that the interlocutory judgment of 1964 was "necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory." The undisputed facts are that in the month of April 1961, the Houston, Texas law firm of Baker & Botts (Messrs. Robert K. Jewett and Denman Moody) were retained to represent Petitioner, Peter Grace, Father Peyton, Tom Doyle, Jack Meehan and the Foundation. An agreement for the settlement of the case was reached in August of 1963, and each of the clients represented by Baker & Botts (including Petitioner) consented in writing by affixing their signatures to the settlement agreement and agreed Judgment. Petitioner signed both documents as "Christopher

Gregory", and under that name appeared "Christopher Gregory, Sometimes Known as Brother Leo, OCSO, Defendant and Cross-Defendant, Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior". The documents signed by Petitioner, Grace, Doyle, Meehan and Father Peyton were transmitted to Baker & Botts and received by them on October 9, 1963; whereupon, Baker & Botts presented the agreement to Mr. Kenneth Oden as the representative of Lytton and Floyd on October 10, 1963, and Mr. Oden undertook to present it to his clients for their signatures. The settlement agreement and Judgment were then signed by the Texas Group and the last person to sign was Mr. Zuber, Assistant Attorney General of Texas, and he signed on October 28, 1963.

Thereafter, on September 1, 1964, the settlement agreement was presented to the trial court for approval and entry of Judgment thereon. Mr. Jewett was acting as a member of his firm, Baker & Botts, in the entry of the Judgment which was provided for in the settlement agreement. Therefore, Mr. Jewett acted upon the terms and provisions of the signed settlement agreement and agreed Judgment which were delivered to him for obvious implementation, and with that authority from Petitioner, his attorney, Mr. Jewett, satisfied the requirements of the settlement agreement with respect to the membership of the Foundation and all other provisions of the settlement agreement. Certain corporate proceedings were to take place in open court incident to the implementation of the Judgment, and Mr. Jewett acted in carrying out in open court those corporate proceedings. Mr. Jewett obtained a proxy from Grace and he received an authorization from Petitioner's Abbot, Thomas Keating, to act for Petitioner in carrying out the corporate proceedings. (A-49) Mr. Jewett had been advised that further authority to act for Petitioner in implementing the settlement and Judgment would be sent to him, and Mr. Jewett did thereafter receive a letter dated July 9, 1964, signed by Petitioner and addressed to his

Abbot. This letter from Petitioner to his Abbot granted to the Abbot full power and authority to act for Petitioner in the premises and constituted the Abbot an attorney-in-fact for Petitioner.[2]

The power of attorney from Petitioner to the Abbot constituting the Abbot as Petitioner's attorney-in-fact and the telex from the Abbot as Petitioner's attorney-in-fact to Mr. Jewett to act as Leo's proxy were additional authority even over and above the settlement agreement and the accompanying Judgment, both signed by Petitioner. These transactions under Texas law constitute the requisite agency and proxy for the entry of the agreed Judgment. *Merriman* v. *Fulton, Hensley & Cross,* 29 Tex. 97 (Tex. Sup., 1862); *Halff* v. *O'Connor,* 37 S.W. 238 (Tex. Civ. App., 1896 writ ref'd.); *Southern Rock Island Plow Co.* v. *Williams,* 80 S.W. 2d 340 (Tex. Civ. App., Amarillo, 1934, writ dism.); *Townsend & Co.* v. *South Plains Monument Co.,* 257 S.W. 648 (Tex. Civ. App., Amarillo, 1924, n.w.h.); Article 1396 2.13 V.A.T.S.; 3 Am. Jur. 2d 434, Sec. 25, Sec. 91; 3 Tex. Jur. 3d, Sec. 46, Agency by Estoppel, p. 76 and Secs. 47-51.

There is no evidence in the record that ecclesiastical rules were considered or even mentioned in connection with the trial of this case. Moreover, the decisions of the Texas courts turned upon principles of Texas law, and there is no federal question presented.

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[2] The July 9, 1964 letter from Petitioner to Abbot Keating read in pertinent part as follows:

"Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement. . . .

"In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon." (Exhibit 3 in evidence).

2.

PETITIONER WAS AFFORDED A TRIAL UPON THE ISSUES AND PLEADINGS THEN BEFORE THE COURT, AND HE FAILED TO DEMONSTRATE ENTITLEMENT TO JURY TRIAL UNDER TEXAS LAW. NO FEDERAL QUESTION IS INVOLVED.

Petitioner had on file a motion to set aside the settlement agreement and agreed interlocutory judgment, alleging several reasons in support of his motion. The Attorney General, joined by other Respondents, filed a motion to dismiss Petitioner's motion and to make the interlocutory judgment a final one. Thus, the issue was joined on all grounds contained in Petitioner's motion as well as on all grounds contained in the motion of the Attorney General, et al. Petitioner, through his attorneys' objections, attempted to unilaterally limit the scope of the hearing to whether or not Petitioner then consented to the settlement agreement and interlocutory judgment. The trial court consistently overruled those objections. The scope of the trial was delineated by the issues framed by the pleadings then before the court, and evidence was admitted upon all such issues. Petitioner was afforded a full and complete trial upon all issues raised by his motion and upon all issues raised by the motion filed by the Attorney General. If Petitioner elected at trial time to stand upon an erroneous principle of law, i.e. that the only issue was whether Petitioner at that time consented to the settlement agreement and interlocutory judgment, then, he has no legitimate complaint to make, and certainly no federal question is inherent in the point.

Therefore, Petitioner was afforded a full and complete trial upon his issues as well as the issues raised by the motion of the Attorney General, and no federal question is involved.

As related to Petitioner's claim of a denial of jury trial, the record discloses that Petitioner's demand for jury trial was not timely made and, moreover, Petitioner failed to request jury trial

or complain of the lack of a jury at the time of the trial on September 21, 1979.

The state is free to establish its own procedures and practices with regard to conduct of civil litigation in Texas courts, including the right to trial by jury. *Iacapondi* v. *New Amsterdam Casualty Company*, 258 F. Sup. 880, D.C. Pa., 1966; aff'd 379 F. 2d 311; certiorari denied in 88 S. Ct. 802, 389 U.S 1054, 19 L. Ed. 2d 849; *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, 427 S.W. 2d 344 (Tex. Civ. App., Dallas, 1968, no writ hist.)

Accordingly, the Texas courts have established their own procedures and practices in connection with the right to a jury trial in civil matters. Article I, Section 15 and Article V, Section 10 of the Texas Constitution, V.A.T.S., preserve and protect the right of any litigant in a civil case to be afforded a jury trial, provided however, that these Texas Constitutional provisions further empower the state legislature to enact such statutes as are necessary to regulate the right to trial by jury.

The Texas Rules of Civil Procedure have been promulgated as the rules governing the trial of civil cases in all Texas courts. Rule 216 et seq., of these Rules of Civil Procedure specifically prescribe the provisions related to the right to a jury trial.[3]

The right to trial by jury in Texas is not an absolute right in civil cases, but rather, it is subject to certain procedural rules, such as Rule 216 of the Texas Rules of Civil Procedure. *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, supra.

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[3] Rule 216 provides that "No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."

Even though the provisions of Rule 216 have been held to be discretionary rather than mandatory in their application, the Texas courts have consistently held that when Rule 216 has not been complied with, a trial court's decision to grant or deny a jury trial will not be reversed on appeal except on a showing of abuse of discretion by the trial court. It is and was a burden on appeal for the Petitioner to show an abuse of such discretion. *Childs* v. *Reunion Bank,* 587 S.W. 2d 466, (Tex. Civ. App., Dallas, 1979, writ ref'd. n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* 299 S.W. 2d 342 (Tex. Civ. App., Dallas, 1957, no writ hist.); *Wooten* v. *Dallas Hunting & Fishing Club, Inc.,* supra. The abuse of discretion, if any, must be shown and must be "apparent on the face of the record." *Ramsey* v. *Dunlop,* 205 S.W. 2d 979 (Tex. S. Ct., 1947); *Hernandez* v. *Light Publishing Company,* 245 S.W. 2d 553 (Tex. Civ. App., San Antonio, 1952, writ ref'd.) The record in this case is completely void of any showing of an abuse of discretion by the trial court. Since there is nothing in the record to show any of the circumstances surrounding the jury request except that it was untimely made, no error and no abuse of discretion was shown by Petitioner. *Lebman* v. *Sullivan,* 198 S.W. 2d 280 (Tex. Civ. App., San Antonio, 1946, writ ref'd n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* supra.

By failing to press his jury demand at trial, Petitioner waived his untimely jury demand and consented to a non-jury trial of the issues before the court. *Hernandez* v. *Light Publishing Company,* supra; *Richardson* v. *Raby,* 376 S.W. 2d 422 (Tex. Civ. App., Tyler, 1964, no writ hist.); *Huddleston* v. *Western National Bank,* 577 S.W. 2d 788 (Tex. Civ. App., Amarillo, 1979, writ ref'd. n.r.e.).

The record in this case does not present any federal question regarding the denial of the right to a trial by jury.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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Date: May 21, 1981

No. 80-1677

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHRISTOPHER GREGORY,

Petitioner,

—v.—

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, THOMAS M. DOYLE, JOHN J. MEEHAN AND J. PETER GRACE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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May 7, 1981

Counter-Statement of the Questions Presented

The questions presented, as stated by petitioner, were not raised, ruled on or relevant in the courts below. They have as their premise the unfounded assertion that the Texas courts relied on an ecclesiastical power of attorney in entering a judgment based on a settlement agreement. Instead, in affirming the judgment of the district court, the court of civil appeals found that petitioner personally and unconditionally signed the settlement and agreed form of judgment and did not communicate to his attorneys, any of the parties, or the trial judge any mental reservation he might have had concerning the consent judgment prior to its rendition (A-37).*

A question preliminary to those raised by petitioner must be:

Is there any substantial federal question presented by the judgment below, or is it based wholly on state-law grounds?

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* The appendix to the petition is abbreviated throughout this brief as "A- ".

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Opinions Below

The judgment of the Supreme Court of Texas refusing petitioner's application for a writ of error, which was without opinion and is not reported, is set forth at A-47. The opinion of the Texas Court of Civil Appeals is reported at 604 S.W.2d 402 (Tex.Civ.App.—San Antonio 1980, writ ref'd n.r.e.) (A-34-38). The judgment of the trial court was rendered without opinion (A-24-33).

Counter-Statement of the Case

Early history of this case

Mrs. Sarita Kenedy East died in Texas in 1961 after willing most of her estate to a charitable foundation, The John G. and Marie Stella Kenedy Memorial Foundation ("KMF"). During the past twenty years, her charitable testamentary wishes have been frustrated by judicial proceedings—with the instant petition being the last.

This proceeding was commenced in 1961 with the filing of a petition and application for injunction in the Texas trial court by Lee H. Lytton, Jr., who sought a declaratory judgment that certain defendants (including petitioner Gregory) were not validly appointed as directors, officers and members of KMF and that he and Jacob Floyd were the only duly elected and appointed representatives of KMF, as well as an injunction against defendants acting in those capacities. Following extended negotiations, all parties to the suit reached a settlement which provided for the election of new members and officers of KMF, for revision of KMF's charter and bylaws to settle qualifications for membership and guidelines for charitable giving, and for a division of Mrs. East's residuary estate between KMF and Sarita Kenedy East Foundation, Inc. ("SKEF"), another charitable foundation.

Both the settlement agreement and a proposed judgment incorporating its terms (A-1-23) were executed by all parties (including Gregory, who signed in both his individual and religious capacities, A-8, and the Attorney General of Texas, by law a necessary party to the proceeding, A-9), and were submitted to the district court for approval. After a hearing on September 1, 1964, at which all parties appeared in open court in person or by their attorneys, the court, after careful consideration, and upon the recommendation of the Attorney General, approved the settlement and entered a judgment dismissing all claims made in this action "with prejudice" as against all defendants including Gregory (A-2, A-6).

The parties had intended that judgment be final in all respects. Certain of Mrs. East's heirs at law (none of whom were parties herein), however, had brought a suit contesting the validity of her will, and a temporary administrator of the estate had commenced an action contesting the validity of certain inter vivos transfers to KMF. A temporary injunction had been entered in this latter action. Because of the pendency of these two suits at the time of the 1964 hearing, the trial court, with the parties' consent, appended an interlocutory order to the agreed judgment which prohibited transfer of the properties KMF had agreed to share with SKEF until the suits were resolved.

Petitioner's first objection

It was not until almost two years after entry of the agreed judgment (and three years after signing the settlement agreement) that Gregory asserted, for the first time in any judicial proceeding, that his consents to the settlement and judgment were not binding on him and that he wished to "withdraw" them. He first did so by a separate proceeding brought in 1966 and dismissed in 1967 on procedural grounds (*see* A-38-47), following which he made a motion to set aside the judgment in this case. During the next eleven years, he took no steps whatever to prosecute that motion.

Implementation of the agreed judgment

By mid-1978, the will contest had been resolved either by settlement or by dismissal of some of the contestants' claims and the exhaustion of all appeals. The related case was dismissed in September 1978. Thus, the contingencies that gave rise to the interlocutory injunctive provision holding up implementation of the otherwise final judgment of 1964 were removed.

These respondents moved in July 1979 for dismissal of petitioner's motion and entry of final judgment. They contended, among other things, that petitioner had no right to withdraw his consent to the judgment years after the event,

and had not met his duty of due diligence but had failed to prosecute his motion for over a decade to the prejudice of the other parties. On September 13, 1979, eight days before the hearing date, petitioner filed an amended motion to set aside the judgment asserting as his primary ground that he "no longer consents or agrees" to the settlement. In that document he demanded for the first time a jury trial on his motion. In addition to other infirmities, that request was untimely under Texas rules of procedure which require that a jury demand be filed not less than ten days in advance of the hearing. Tex.R.Civ.P. 216.

At the hearing, which was held on September 21, 1979, petitioner's counsel did not press his untimely jury demand. The district court heard testimony from a former assistant attorney general of Texas, two members of the law firm of Baker & Botts (petitioner's counsel of record at the time of the settlement and the 1964 judgment) and counsel representing KMF and the East estate. Each of these witnesses had participated in the settlement negotiations and the 1964 hearing, and each testified that at no time prior to the trial court's 1964 judgment approving the settlement, and dismissing all claims asserted herein with prejudice, did Gregory ever express the slightest reservation concerning the settlement.

Petitioner also testified at the hearing. He admitted that he signed the settlement agreement and the judgment and did not dispute any of the prior testimony concerning his failure to inform the other parties, his own counsel or the court of any mental reservation or condition to his consent (A-36).

On November 28, 1979, the district court dismissed Gregory's motion to vacate the 1964 judgment, dissolved the interlocutory provisions thereof, and "reaffirmed" and "made final" said judgment "in all other respects" (A-25). Since no federal question had been raised up to this point in the proceedings, the district court did not rule on any such issue.

Appellate review

The Texas Court of Civil Appeals affirmed the judgment of the district court, stating in part:

> "[I]n 1963 a settlement agreement was entered into by the parties. The appellant signed this agreement both in his individual and religious capacities. Although the interlocutory judgment incorporating this agreement was not rendered for more than a year after the settlement agreement was executed, neither the appellant's attorneys, the attorneys for the appellee, the trial judge, nor any of the other parties to the suit, knew of the conditional nature of his consent until several months after the judgment was rendered.
>
> "The appellant's attorneys negotiated a settlement in his behalf and were in possession of a settlement agreement and proposed judgment, which, on their face, were unconditionally executed and assented to by the appellant. We hold that Baker & Botts was authorized to seek a judgment entered in accordance with the settlement agreement, and that the appellant's failure to communicate to his attorneys, the appellees' attorneys, the trial judge, or any of the other parties, the conditional nature of his consent before the judgment was rendered, precludes him from denying this authority. *See Allsman* v. *Robinson*, 25 S.W.2d 237, 239 (Tex.Civ.App.—El Paso 1930, no writ).
>
> "For the reasons stated above we overrule the appellant's points of error and affirm the judgment of the trial court." (A-37)*

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* Although these findings should be conclusive for purposes of this petition, Gregory here contends that his consent was revoked prior to the 1964 hearing (Pet., p. 5) and cites a letter dated June 5, 1964 (A-50). Gregory admitted in his testimony at the district court hearing that, on his instructions to his unannounced attorney (Joyce), this letter was not sent until six months after its date, when it was attached to Joyce's December 9, 1964 letter (A-51). Messrs. Oden and Moody, the addressees of the letters set forth at A-51 and

Petitioner's application for writ of error was refused by the Supreme Court of Texas (with the notation "no reversible error") as was his motion for rehearing thereon (A-47-48). Neither of the Texas appellate courts which were asked to review the judgment in this action found it necessary to consider any federal question. Similarly notable is the absence of any reference to a federal question in the dissenting opinion in the court of civil appeals (A-37-39).

Reasons for Denying the Writ

I.

NEITHER THE DECISIONS BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

This case was presented to the Texas courts on the issue of whether petitioner had the right to revoke his consent to a settlement which was considered and approved by the district court some fifteen years earlier. The Texas courts, applying Texas law, held that he could not. Apparently aware that the matters raised and resolved in Texas present no conceivable federal questions, Gregory here concocts arguments which, however interesting in a hypothetical sense, are simply unsupported by the facts and unrelated to the proceedings below.

Ignoring the facts as found by the courts below, petitioner boldly asserts that the 1964 judgment was "necessarily based solely on Keating's asserted ecclesiastical right to act on behalf of Gregory" (Pet., p. 9).* Petitioner further states that "on September 1, 1964, the judge in the trial court below accepted

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A-52, both testified that they first saw the "June" letter (A-50) in December, three months *after* judgment was entered. This was their first knowledge that Gregory wished to withdraw his consent.

* Rev. Thomas A. Keating was petitioner's abbot or religious superior when Gregory was associated with a Trappist monastery.

a written power of attorney as binding on Gregory, and entered judgment pursuant to that power of attorney" (Pet., p. 8). This wholly incorrect assumption is then used as a launching pad for the fantasy that the "south Texas courts" were unduly impressed by "ecclesiastical rules" in violation of the Establishment Clause (Pet. Question 1).

The first reference to a "power of attorney" (actually two telegrams (A-48, A-49) from Gregory's religious superior and a letter from petitioner to that superior) in this case was made by Gregory's attorney during his cross-examination in the 1979 hearing on respondent's motion for the entry of a final judgment. Those documents were not presented to, or "accepted" by (and so could not possibly have influenced), the trial judge at the 1964 hearing. Thus petitioner's present claim that the Texas court felt compelled "to adhere to a religious belief" is nothing more than a belated attempt to fashion a constitutional argument out of whole cloth.

Petitioner argues that the courts below must have accepted the "power of attorney" based on an "ecclesiastical right" of the abbot to give it because "there was no evidence before the court of civil authority or agency" (Pet., p. 14). In fact, there was no assertion of ecclesiastical authority by respondents nor any acceptance thereof by the courts in either 1964, when judgment was entered, or at the 1979 hearing when these documents were first presented to the trial court. On the other hand there was abundant evidence that Gregory (individually and as a religious) had authorized the settlement and judgment.

Robert Jewett, Esq. of Baker & Botts, who represented Gregory in 1964, testified at the 1979 hearing that the documents signed by Gregory recited in detail all of the steps that were to be taken in open court, and that he had every reason to believe that he was authorized to act for Gregory in taking them. He based this on Gregory's unconditional written consent to the settlement and judgment, both in his individual and religious capacities, as well as on subsequent conversations

with his client. Jewett viewed his communications from the abbot (who was not a party to these proceedings) merely as further confirmation of his authority to take the corporate steps that were agreed to in the settlement.* On cross-examination by Gregory's attorney in 1979, Jewett was asked if he considered those documents as constituting a power of attorney, and he said that he did. In response to further questioning by Gregory's counsel, Jewett stated that he was not familiar with the authority exercised by an abbot over a monk in a monastic order. At no time did respondents assert that Keating had ecclesiastical authority to act for Gregory and the courts below simply had no occasion to consider the questions of church-state accomodations which Gregory would now raise.

II.

THE DECISIONS BELOW ADEQUATELY DISPOSE OF THE ISSUES HEREIN ON THE BASIS OF STATE LAW AND RAISE NO FEDERAL QUESTION.

After consenting to the 1964 judgment, Gregory moved to set it aside in 1968 but took no action over the next eleven years to prosecute his motion. When the dismissal of related cases made it appropriate for respondents to move for final judgment and vacatur of the interlocutory order preventing

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* The two telegrams appear at A-48, A-49. The other document introduced was a copy of a July 9, 1964 letter from petitioner to Abbot Keating which reads in pertinent part as follows:

> "Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement. . . .
>
> "In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon." (Exhibit 3 in evidence).

final implementation of the settlement, Gregory asserted that he "no longer consents" to the settlement. The Texas Court of Civil Appeals held, as a matter of Texas law, that a party may not undo his previously granted consent so late in the judicial day. Such a decision is plainly within the power of a Texas court and, in fact, constitutes the entire basis for the decision below.

We have already noted that there is no First Amendment issue here because there was no reliance by the Texas courts on "ecclesiastical rules". Moreover, petitioner's efforts to find violations of the Fourteenth Amendment in the proceedings below are factually unfounded and constitute an attempt to revive an issue which was disposed of on adequate and independent state grounds. Petitioner now asserts that he was not given the opportunity to be heard with respect to his consent to the settlement "prior to the entry of the initial judgment on September 1, 1964" (when he did not ask to be heard) and that "in 1979, Gregory was again denied the right to a trial on the issue of his consent *at that time* to the settlement" (Pet., p. 17, emphasis supplied).

The 1964 proceeding was a hearing at which the court approved a settlement on the basis of the signed consents of all parties to the judgment entered dismissing all claims herein.* Petitioner later testified that he had secretly consulted counsel other than his attorneys of record in June of 1964. He never asserted, however, that prior to the entry of the 1964 judgment he informed (and the Texas courts found that he did not inform) his attorneys of record, the trial court, or any of the other parties to this proceeding or their attorneys of record, that he wished to be heard or that he had any reservations concerning his consent. To assert now that he was denied a hearing in 1964 (never having made such an argument to the

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* Gregory's signature on both documents signified that he was "Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior" (A-8). This did not go unnoticed by the court of civil appeals (A-37).

Texas courts) is specious, at best, and surely the sort of factual issue which does not lend itself to review by this Court.

In 1979, when Gregory sought to renege on the settlement and "withdraw" his consent, he had an evidentiary hearing at which he testified and was represented by counsel whose proof was in no way restricted or limited by the trial court. Petitioner now suggests that he was entitled to a jury trial (which he had earlier waived in the settlement agreement and agreed judgment, A-2) on a motion dealing with an issue which was equitable in nature (*i.e.*, whether he could rescind a consent given sixteen years earlier) despite the fact that his jury demand was untimely under the Texas Rules of Civil Procedure. As noted above, this issue was not properly raised at the trial court level. Thereafter, although the Texas appellate courts were given the opportunity to review the question of Gregory's right to a jury trial, neither of them considered it necessary to reach the question.

Thus petitioner has failed to preserve the questions he now asks this Court to consider, failed to proceed as Texas rules of procedure dictate, and failed to persuade the courts below of the merit of his position. Now, he asks this Court, in effect, to review the findings of fact made by the Texas courts which persuaded them (wholly as a matter of Texas law, and without reference to any federal question) that he could not withdraw his consent to the agreed judgment. That, we submit, is an exercise unworthy of this Court's attention.

CONCLUSION

The petition should be denied.

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